UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

North Memorial Health Care,

Petitioner,

v.

Case No. 16-3433

National Labor Relations Board,

Respondent.

PETITION FOR REVIEW OF A DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

North Memorial Health Care hereby petitions the United States Court of Appeals for the Eighth Circuit for review of the August 2, 2016, Decision and Order of the National Labor Relations Board in NLRB Case Nos. 18-CA-132107, 18-CA-133944, 18-CA-135228, 18-CA-132818, published at 364 NLRB No. 61, and attached hereto as Exhibit A.

Dated: 8-19-16

FELHABER, LARSON, FENLON & VOGT, P.A.

By: *s/ Thomas R. Trachsel*

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ATTORNEYS FOR THE PETITIONER

North Memorial Health Care *and* SEIU Healthcare Minnesota

North Memorial Health Care *and* Minnesota Nurses Association. Cases 18–CA–132107, 18–CA–133944, 18–CA–135228, and 18–CA–132818

August 2, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND MCFERRAN

On September 3, 2015, Administrative Law Judge Paul Bogas issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a responsive letter.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, brief, and responsive letter and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

AMENDED REMEDY

Because of the public nature of the Respondent's unfair labor practices, the timing of the violations around the Unions' planned picketing, and the involvement of upper management, we find that a further remedy is appropriate in addition to those ordered by the judge. See, e.g., *Carey Salt Co.*, 360 NLRB No. 38, slip op. at 2 (2014); *HTH Corp.*, 356 NLRB 1397, 1404 (2011), enfd. 693 F.3d 1051 (9th Cir. 2012); *Homer D. Bronson Co.*, 349 NLRB 512, 515 (2007), enfd. mem. 273 Fed. Appx. 32 (2d Cir. 2008). To dissipate as much as possible any lingering effect of the Respondent's serious and widespread unfair labor practices and enable employees to exercise their Section 7 rights free of coercion, we will require that the remedial notice be read aloud to the Respondent's employees by a responsible management official of the Respondent, and in the presence of a Board agent and an agent of the Union if the Region or the Union so desires, or at the Respondent's option, by a Board agent in the presence of a responsible management official and, if the Union so desires, of an agent of the Union.[3] See, e.g., *1621 Route 22 West Operating Co., LLC d/b/a Somerset Valley Rehabilitation & Nursing Center*, 364 NLRB No. 43, slip op. at 5 (2016); *Texas Super Foods*, 303 NLRB 209, 220 (1991).[4]

ORDER

The National Labor Relations Board orders that the Respondent, North Memorial Health Care, Robbinsdale, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

No exceptions were filed to the judge's decision not to defer the complaint allegations for resolution through the parties' grievance and arbitration process. Further, in the absence of exceptions, we adopt the judge's dismissal of the allegations that the Respondent violated Sec. 8(a)(1) when it threatened to file unfair labor practice charges against union representatives, violated Sec. 8(a)(1) and Sec. 8(a)(5) when it prohibited nonemployee union representatives from accessing locked employee break rooms on patient care units, and violated Sec. 8(a)(5) and (1) by implementing the following unilateral changes: prohibiting a nonemployee union representative from accessing a bulletin board in a locked employee break room and prohibiting bargaining unit employee Melvin Anderson from posting union information on a bulletin board in the department where he worked. As discussed below, however, we agree with the judge that this last prohibition violated Sec. 8(a)(1).

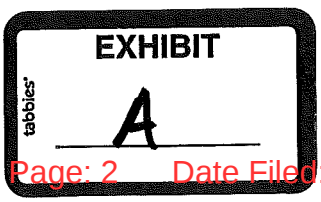
In finding that the Respondent violated Sec. 8(a)(1) when it prohibited Anderson from posting union information on the department bulletin board, we rely on the judge's finding that the Respondent's action constituted unlawful discrimination. The Respondent prohibited Anderson from posting flyers regarding the union-sponsored picketing, but permitted him to post flyers regarding a union promotion at a zoo on the same bulletin board. The Respondent's restriction was thus based on the content of the Union's message—which here also involved protected Sec. 7 activity—and not pursuant to a neutral policy. We do not rely on the judge's alternative finding that the prohibition was "presumptively unlawful."

In deciding the issues before us, we do not rely on the judge's citation to *NeilMed Products*, 358 NLRB 47 (2012). See *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014).

[2] We shall also modify the judge's recommended Order to conform to the violations found, to our amended remedy, and to the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified and in accordance with our decision in *Durham School Services*, 360 NLRB No. 85 (2014).

[3] Although the General Counsel did not except to the judge's denial of his request for a similar remedy, his failure to do so does not preclude our imposing such a remedy. The Board has broad discretionary authority under Sec. 10(c) to fashion appropriate remedies that will best effectuate the policies of the Act. *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262–263 (1969). It is well established that remedial matters are traditionally within the Board's province and may be addressed by the Board even in the absence of exceptions. See, e.g., *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 fn. 6 (1995), enfd. in relevant part 97 F.3d 65 (4th Cir. 1996); *Schnadig Corp.*, 265 NLRB 147, 147 (1982).

[4] We have also modified the judge's recommended tax compensation and Social Security reporting remedy in accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).



(a) Prohibiting nonemployee representatives of the SEIU and/or the MNA from having nondisruptive union-related conversations at the Robbinsdale, Minnesota facility (the facility) in areas that are open to the general public.

(b) Physically interfering with the ability of nonemployee representatives of the SEIU and/or the MNA to meet with, and talk to, employees at the facility in areas that are open to the general public.

(c) Surveilling the conversations that nonemployee representatives of the SEIU and/or the MNA have with employees at the facility.

(d) Ejecting nonemployee representatives of the SEIU and/or the MNA from the facility, banning such individuals from the facility, and/or threatening to have such individuals arrested because they engage in nondisruptive union-related conversations at the facility in areas that are open to the general public.

(e) Prohibiting employees in the sterile processing department at the facility from posting union information on the bulletin board in that department.

(f) Coercively interrogating employees about their union activities and/or threatening that such activities have been placed under surveillance.

(g) Prohibiting off-duty employees and/or nonemployee union representatives from wearing shirts with union insignias while in locations at the facility that are not immediate patient care areas.

(h) Changing the terms and conditions of employment of its unit employees represented by the SEIU and/or the MNA without first notifying SEIU and/or MNA and giving SEIU and/or MNA an opportunity to bargain.

(i) Unilaterally imposing restrictions on the activities of nonemployee representatives of the SEIU and/or the MNA in areas at the facility that are open to the general public.

(j) Ejecting and/or banning nonemployee representatives of the SEIU and/or the MNA from the facility for violating unlawfully imposed restrictions on union activity.

(k) Discharging or otherwise discriminating against employees for supporting the SEIU or any other labor organization.

(l) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the restrictions unlawfully imposed on the union activities of nonemployee union representatives.

(b) Rescind the restrictions unlawfully imposed on employees' posting of union information on the bulletin board in the sterile processing department.

(c) Rescind the restriction unlawfully placed on the wearing of shirts with union insignias in locations at the facility that are not immediate patient care areas.

(d) Rescind the trespass notices/warnings issued to SEIU representative Frederick Anthony and MNA representative Karlton Scott, and notify them that this has been done.

(e) Within 14 days from the date of this Order, offer Melvin Anderson full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(f) Make Melvin Anderson whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(g) Compensate Melvin Anderson for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 18, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

(h) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Melvin Anderson, and within 3 days thereafter, notify Anderson in writing that this has been done and that the discharge will not be used against him in any way.

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(j) Within 14 days after service by the Region, post at its Robbinsdale, Minnesota facility copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and main-

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

tained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 23, 2014.

(k) Within 14 days after service by the Region, hold a meeting or meetings during working hours, which shall be scheduled to ensure the widest possible attendance of unit employees, at which time the attached notice is to be read to employees by a responsible management official, in the presence of a Board agent and an agent of the Union, if the Region or the Union so desires, or, at the Respondent's option, by a Board agent in the presence of a responsible management official and, if the Union so desires, of an agent of the Union.

(l) Within 21 days after service by the Region, file with the Regional Director for Region 18 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 2, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT prohibit nonemployee representatives of SEIU Healthcare Minnesota (SEIU) and/or Minnesota Nurses Association (MNA) from having nondisruptive union-related conversations at the Robbinsdale, Minnesota facility (the facility) in areas that are open to the general public.

WE WILL NOT physically interfere with the ability of nonemployee representatives of the SEIU and/or the MNA to meet with, and talk to, you at the facility in areas that are open to the general public.

WE WILL NOT surveil the conversations that nonemployee representatives of the SEIU and/or the MNA have with you at the facility.

WE WILL NOT eject nonemployee representatives of the SEIU and/or the MNA from the facility, ban such individuals from the facility, and/or threaten to have such individuals arrested because they engage in nondisruptive union-related conversations in areas at the facility that are open to the general public.

WE WILL NOT prohibit employees in the sterile processing department at the facility from posting union information on the bulletin board in that department.

WE WILL NOT coercively interrogate you about your union activities and/or threaten that we have placed such activities under surveillance.

WE WILL NOT prohibit off-duty employees and/or nonemployee union representatives from wearing shirts with union insignias while in locations at the facility that are not immediate patient care areas.

WE WILL NOT change the terms and conditions of employment of unit employees represented by the SEIU and/or the MNA without first notifying SEIU and/or MNA and giving SEIU and/or MNA an opportunity to bargain.

WE WILL NOT unilaterally impose restrictions on the activities of nonemployee representatives of the SEIU and/or the MNA in areas at the facility that are open to the general public.

WE WILL NOT eject and/or ban nonemployee representatives of the SEIU and/or the MNA from the facility for

violating unlawfully imposed restrictions on union activity.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the SEIU or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the restrictions unlawfully imposed on the union activities of nonemployee union representatives.

WE WILL rescind the restrictions unlawfully imposed on employees' posting of union information on the bulletin board in the sterile processing department.

WE WILL rescind the restriction unlawfully placed on the wearing of shirts with union insignias in locations at the facility that are not immediate patient care areas.

WE WILL rescind the trespass notices/warnings issued to SEIU representative Frederick Anthony and MNA representative Karlton Scott and notify them that this has been done.

WE WILL, within 14 days from the date of the Board's Order, offer Melvin Anderson full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Melvin Anderson whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL compensate Melvin Anderson for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 18, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Melvin Anderson, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL hold a meeting or meetings during working hours and have this notice read to you and your fellow employees by a responsible management official, in the presence of a Board agent and an agent of the Union, if the Region or the Union so desires, or by a Board agent in the presence of a responsible management official and, if the Union so desires, of an agent of the Union.

NORTH MEMORIAL HEALTH CARE

The Board's decision can be found at www.nlrb.gov/case/18–CA–132107 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Florence I. Brammer, Esq. and *Abby E. Schneider, Esq.*, for the General Counsel.

John C. Hauge, Esq. and *Thomas R. Trachsel, Esq. (Felhaber, Larson, Fenlon & Vogt, P.A.)*, of Minneapolis, Minnesota, for the Respondent.

Justin D. Cummins, Esq. (Cummins & Cummins), of Minneapolis, Minnesota, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. I heard these consolidated cases in Minneapolis, Minnesota, from February 2 to 5, 2015. The SEIU Healthcare Minnesota (the SEIU) filed the charge in Case 18–CA–132107 on July 3, 2014, and an amended charge in that case on August 21, 2014. The SEIU filed the charges in Cases 18–CA–133944 and 18–CA–135228 on August 4, 2014, and August 22, 2014, respectively. On September 30, 2014, the SEIU filed the amended charge in Case 18–CA–135228. The Minnesota Nurses Association (the MNA) filed the charge in case 18–CA–132818 on July 15, 2014. The Regional Director for Region 18 of the National Labor Relations Board (the Board) issued the consolidated complaint and notice of hearing on October 27, 2014.[1]

The complaint alleges that the Respondent, North Memorial Health Care, unlawfully interfered with union activity and made unlawful unilateral changes in practices in violation of Section 8(a)(1) and Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) when it limited the ability of the SEIU and the MNA to access public and non-public areas of the Respondent's hospital facility for union activities, including activities relating to the Unions' joint informational picketing near the facility on June 24, 2014. The complaint also alleges that the Respondent violated Section 8(a)(3) and (1) by discharging employee Melvin Anderson because of his union activities. The Respondent denies that it committed any violation

[1] Case 18–CA–133721, was originally part of the consolidated complaint, but, on the Respondent's motion, was severed for deferral to arbitration by the January 8, 2012, order of Deputy Chief Judge Arthur Amchan.

of the Act, and contends that it was simply requiring the Unions to engage in their activities in the manner provided for by the relevant collective-bargaining agreements and consistent with past practice, and that it terminated the Anderson for legitimate, nondiscriminatory, reasons.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Minnesota non-profit corporation with an office and place of business in Robbinsdale, Minnesota, operates an acute care hospital where it annually purchases and receives goods and services valued in excess of $50,000 directly from suppliers located outside the State of Minnesota and earns gross revenues in excess of $500,000. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the SEIU and the MNA are both labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The relevant events in this case took place in and around the Respondent's acute care hospital facility in Robbinsdale, Minnesota (the facility). The SEIU represents a bargaining unit of about 800 service employees at the facility. This unit has been in place for over 60 years. The SEIU also represents three smaller units there: a pharmacist unit with about 30 members; a licensed practical nurse (LPN) unit with about 20 members; and a home health aide and home health clerical worker unit with about 50 employees. The Respondent bargains with the SEIU as part of a multiemployer group that includes seven other hospitals. The second union involved in this case, the MNA, represents a unit of approximately 980 registered nurses employed by the Respondent. During the relevant time period, collective bargaining agreements were in effect for all of the SEIU and MNA units.

Many of the allegations in this case concern the Respondent's efforts to limit the Unions' activities inside the facility in late June 2014 when the SEIU and the MNA joined forces to engage in joint informational picketing outside the facility. Both of these unions are large—the SEIU's contracts cover approximately 43,000 workers in Minnesota, and the MNA has approximately 20,000 members in Minnesota, Iowa and Wisconsin. The stated objective of their joint picketing, which brought approximately 500 picketers to a public park adjacent to the facility, was to highlight concerns that the Respondent had compromised patient care by making changes to staffing levels. The areas where the Respondent was particularly aggressive in limiting union activities included the lobby and atrium inside the main public entrance to the facility,[2] the public cafeteria, employee break rooms, and a bulletin board in the sterile processing and dispensing (SPD) department. To prevent union activity in the these areas, the Respondent took steps that included, but were not limited to, summoning local police to the facility, banning two union representatives from the facility for a 1-year period,[3] stationing staff "greeters" at entrances who were directed to require individuals who entered wearing union shirts to either cease displaying the shirts or leave the facility, having security officers and management personnel direct individuals to remove their union shirts or leave the facility, and escorting union representatives to the security office and/or out of the facility.

In its efforts to limit union activity at the facility in June 2014, the Respondent took the position that SEIU officials could not engage in union activity in the cafeteria or other public areas of the facility that employees frequented, but rather were entitled to do so only in two areas that the Respondent had "designated" for such purposes. One of the two areas designated by the Respondent for union activity was in the lower level beneath the lobby, and the second was near an underground tunnel to a parking facility. As compared to the main entryway, cafeteria, and break rooms, these were out-of-the-way areas where employees were not known to congregate. Neither designated area had doors that could be closed to provide privacy. The Respondent did not consider the two designated areas to be "public," and provided no signage on the main floor directing employees to them, but there were no security measures that would prevent a random visitor to the hospital or staff that was not in the bargaining unit from entering the designated areas. The SEIU could also ask to reserve other areas of the facility for particular events and the Respondent frequently agreed to such requests. For its part, the MNA had the use of an enclosed office on the lower level of the hospital.

The Respondent's agents also took the position that, although there were numerous bulletin boards at the facility on which information was posted for employees, the SEIU was only permitted to post information for the service unit and the LPN unit on a single bulletin board that the Respondent designated for that purpose. This bulletin board was located in proximity to the public cafeteria, but on a low-traffic hallway.[4] In addition, the Respondent took the position that an employee in the SPD unit could not post union information on the bulletin board in that unit.

B. History Regarding Union Access to Facility

The record shows that for a number of years prior to the time of the alleged violations, union representatives regularly visited the public cafeteria and made themselves available there to unit

[2] The waiting areas for the facility's surgical, imagining, and heart and vascular services departments are located one or two levels above the main entrance lobby, but within sight and sound of that lobby.

[3] The Respondent's officials refer to banning individuals from the facility under threat of arrest as "trespassing" those individuals. The Respondent communicates the ban by issuing a written "Trespass Warning" to the individual. The trespass warnings issued in this case state that the named individual is to leave the Respondent's premises, that the warning is to remain in effect for a period of a year, and that failure to comply will result in arrest and prosecution under State law.

[4] There is also a separate designated bulletin board in the pharmacy department for the pharmacists unit, and one in the home health employees' department for the home health employees' unit.

employees who wanted to talk to them while on break. Jamie Gulley (SEIU president), Linda Hamilton (MNA president), Frederick Anthony (nonemployee SEIU organizer), Joseph McMahon (non-employee MNA labor specialist) and Karlton Scott (non-employee MNA labor specialist/organizer) all credibly testified to this. McMahon and Scott visited the facility one to three times every week to engage in such activities. Anthony visited the facility every day or every other day and usually went to the cafeteria. These gatherings in the cafeteria generally involved employees who chose to approach the union representatives—they were not meetings in the sense of involving prearranged times for one or more union representatives to make a presentation to an assembled group of unit members. The non-employee representatives, like other visitors to the facility, were not required to clear security, sign-in, or identify themselves in order to enter the main lobby and public cafeteria.

The Respondent does not claim, and the record does not suggest, that the activities of nonemployee representatives of either the SEIU or the MNA in the cafeteria on June 23, June 24, and August 21, 2014, were disorderly or disruptive to patients or visitors. Although Jeffrey Cahoon, the Respondent's director of employee and labor relations, and other Respondent officials were aware of the SEIU's activities in the cafeteria, the Respondent generally did not interfere with those activities prior to June 23, 2014. Indeed, when Cahoon saw non-employee union representatives in the cafeteria during that earlier period he would sometimes engage them in union business. The Respondent did not have any rules generally prohibiting employees and visitors from discussing particular subjects in the cafeteria.

In two instances involving somewhat unique circumstances, the Respondent did interfere with activity by SEIU representatives in the cafeteria prior to June 2014. Neither of these is alleged to be a violation in this litigation. One occurred on September 10, 2013, when Anthony tried to hold a scheduled stewards' meeting—a larger, pre-arranged, group meeting of about 10 individuals—in the cafeteria after the Respondent cancelled the reservation that Anthony had made for a private room at the facility. George Wesman (Respondent's labor relations representative) confronted Anthony about holding the meeting in the cafeteria and ejected him from the facility. In a September 18 letter, the Respondent's attorney asserted that Anthony had violated the collective bargaining agreement by attempting to hold the stewards' meeting in the cafeteria and warned "that any future violations on this issue will result in the [Respondent] taking appropriate action including having Mr. Anthony removed from the [Respondent]'s property." In the letter, the Respondent took the position that under the contract, the SEIU could only conduct union business in the two areas that the Respondent had designated, unless the Respondent allowed it to reserve another area.

On October 30, 2013, the Respondent and the Union met regarding issues raised by the September 10 incident, including an unfair labor practices charge and a grievance filed by the Union regarding the cancellation of the reservation for a private room. Present for the Respondent were Cahoon, Wesman, and attorney Thomas Trachsel.[5] Present for the SEIU were James Bialke (SEIU chief of staff) and Anthony. The Respondent's representatives stated that the facility did not want group meetings to take place in the cafeteria, and asserted that the SEIU had to use the two areas that the Respondent had designated for such purposes, or obtain the Respondent's approval to reserve another area. Cahoon and Trachsel testified that the Respondent informed the SEIU that management considered it acceptable, however, for the Union's non-employee representatives to gather with unit members in the cafeteria when those gatherings only included two or three individuals. Wesman testified that there is no prohibition on union representatives talking to employees in the cafeteria about union matters, and that such interactions only become a problem when, in the Respondent's view, they rise to the level of a "meeting."

Another pre-June 2014 instance in which the Respondent objected to activities by union representatives in the public cafeteria occurred on November 18, 2013. Gulley, who was at the time running for president of the SEIU, had publicized that he would be available in the cafeteria that day at a specific time to discuss his candidacy with members who wished to meet with him. In the cafeteria, Gulley sat at a table where he was accompanied by another candidate for union office and by Anthony. At some point, Cahoon and Wesman confronted the candidates, and Cahoon said he was "disappointed" that they were having a union meeting in the cafeteria. Gulley responded that they were not there on union business, but rather were there on their personal vacation time and acting in their personal capacities regarding the upcoming election. Gulley stated that he was only planning to be present in the cafeteria for another 15 minutes and would appreciate being allowed to finish what he was doing. Cahoon did not interfere further that day, but later, in a November 25, 2013, letter to Bialke (SEIU chief of staff), Cahoon asserted that Gulley and the others had been carrying out union activity in the cafeteria in violation of the collective bargaining agreement. He stated that the Respondent had the "right to designate where in the facility union representatives are—and are not—permitted to engage in permitted activities." Cahoon warned that unless the SEIU provided an "explanation" for the November 18 activities, and unless the Respondent was "satisfied" with that explanation, the Respondent might take further action that would include "trespassing union agents and barring them from further access, filing charges with the NLRB, seeking enforcement of the collective bargaining agreement, and/or pursuing other legal and equitable relief."

Bialke, in a January 24, 2014, correspondence to Cahoon about this dispute, stated that Cahoon had evidenced a "total failure to understand our rights to engage with our members," and that the SEIU had "nowhere . . . given up our rights under the National Labor Relations Act to have access to public areas and specifically the cafeteria." He acknowledged that the Respondent had repeatedly tried to "restrict this access," but stated that "we have not agreed to that." The SEIU president, Jamie Gulley, testified that the "designated areas" are two "non pub-

[5] Attorney Trachsel is also trial counsel for the Respondent in this litigation.

lic" areas where the Union can operate *in addition* to the cafeteria and other public areas at the facility—not to the exclusion of the public areas.

The record does not show that, during the relevant time period, either the Respondent or the Unions ever gave notice or an opportunity to bargain regarding proposed changes to the practices regarding union use of the cafeteria or other areas at the facility that were open to the general public. Cahoon and Wesman made conclusory statements to Anthony and other SEIU officials asserting that the Union was only permitted to engage in union activities in areas that the Respondent had authorized for that purpose, but did not represent this as a proposed change that the SEIU could bargain over.[6] The Respondent did not show that it has a generally applicable policy or practice of prohibiting gatherings or solicitations in the cafeteria, or that it has ever interfered with a non-union-related gathering of any size in the cafeteria. Nor has the Respondent claimed that it has a generally applicable policy that limits the topics that visitors are permitted to discuss in the cafeteria. In addition, while the record shows the instances discussed above when the Respondent attempted to limit use of the cafeteria by non-employee SEIU representatives, the record does not show that, prior to June 2014, it had ever taken action to limit use of the cafeteria by nonemployee *MNA* representatives.

The evidence showed that in addition to meeting with employees in the public cafeteria, nonemployee representatives of the Unions have, on a continuing basis since at least 2010, regularly entered employee break rooms on patient care units to update union information on bulletin boards and/or speak briefly with unit members who were on break in those areas. McMahon, Anthony, Scott, Gulley, Hamilton, and Anderson all gave confident and credible testimony in this regard. McMahon and Anthony both circulated through the hospital to update bulletin board information on a regular basis and, prior to the events of 2014, management did not interfere with these activities. The evidence showed that the doors to the employee break rooms are generally kept locked, but could be opened by entering a combination. Often the nonemployee union representatives gained access to the break rooms by identifying themselves to personnel at the nursing station or charge desk on the unit and stating that they needed to update union information on the bulletin boards. The individuals who provided assistance to them were nurse managers, health unit coordinators or bargaining unit employees. None of these persons notified Cahoon that they were allowing nonemployee union representatives to enter the break rooms. The Respondent had not, prior to the time of the alleged violations, told the nonemployee union representatives either that they were prohibited from entering the break rooms or that they were permitted to do so.[7] In order to reach these break rooms, the union representatives would have to walk down hallways on which patient rooms were located. The break rooms were small and generally each had a table that could accommodate approximately eight individuals. Although the Respondent had not previously told Anthony that he was prohibited from accessing the break rooms, Wesman did, during a December 16, 2013, discussion about the use of larger meeting rooms, tell Anthony that he could not use certain meeting rooms because he was not permitted on patient care floors.

Witnesses for the Respondent conceded that union information was posted on the bulletin boards in the break rooms. A number of the Respondent's witnesses, including Cahoon, security supervisor Edwin Markey, unit nurse manager Laurie McQuilkin, also testified that they had never noticed, or been informed about, nonemployee union representatives entering employee break rooms on patient care units to make such postings. I credit that testimony, but also conclude that it does rebut the credible testimony of multiple union representatives that—with the assistance of nurse managers, charge nurses, and bargaining unit employees—they regularly accessed bulletin boards in employee break rooms on patient care units. Although union representatives engaged in these activities on at least a monthly basis, the activity would not have taken long to complete and it is plausible that the union representatives engaged in the conduct that they described without being observed by the Respondent's witnesses. Based on my assessment of the credibility of the witnesses, and the record as a whole, I conclude that this was the case here.

The first record evidence of conflict between the Respondent and the SEIU regarding access to bulletin boards occurred in February 2014 and concerned a bulletin board in a locked break room on a cardiac intensive care unit known as "4 SW." In order to reach this break room an individual would have to traverse the nurse's station, an area that non-employees who were visiting patients would not generally enter. Anthony told Marlys Chesney, the nurse manager of the 4 SW unit,[8] that the SEIU had used a bulletin board on that unit in the past, but that the bulletin board was removed during remodeling and was not replaced. Chesney agreed to replace the bulletin board and told Anthony that he could place SEIU information there at any time. Thereafter, however, Chesney told Anthony that the Respondent's human resources/labor relations officials had informed her that if Anthony wanted to post something he would have to submit the material to Cahoon or Wesman and that they would decide whether to post it. Wesman, in a February 10, 2014, memorandum to Anthony, accused Anthony of making a unilateral change to the collective bargaining agreement by arranging with Chesney to place the bulletin board in the 4SW

[6] See R. Exh. 13 (Aug. 29, 2008 letter from Cahoon to the SEIU), R. Exh. 32 (March 30, 2009, memorandum from Wesman to SEIU), R. Exh. 33 (July 9, 2009, letter from Wesman to the SEIU), R. Exh. 38 (Oct. 3, 2012, from Wesman to SEIU).

[7] Cahoon and Wesman testified that it was not within the authority of the health unit coordinators or nurse managers to decide to allow nonemployee union representatives to access break rooms on patient care floors. The Respondent did not identify any provision in the collective bargaining agreement or other writing setting forth this limitation. Nor did the Respondent show that, prior to June 2014, it had ever notified nurse managers, health unit coordinators or other staff that they lacked authority to decide when to allow nonemployees to access the employee break rooms. On the other hand, SEIU officials Bialke and Anthony both testified that they dealt with Cahoon and Wesman when it came to access issues at the facility.

[8] The parties stipulated that Chesney was a supervisor under Sec. 2(11) of the Act.

unit. Wesman stated that this was a "non-designated" area. Anthony had not previously informed Cahoon or Wesman that the SEIU was accessing this locked break room, or sought their approval to do so.

It is important in this case to note not only the evidence that was presented, but also some evidence that was not. The Respondent did not introduce a written policy or contract provision that prohibited non-employee visitors from accessing the employee break rooms where bulletin boards were located, or from posting on those bulletin boards. Nor did the Respondent show that, prior to February 2014, it had ever advised health unit coordinators, nurse managers or others working on the patient care units that they did not have authority to allow non-employee union visitors to enter the employee break rooms. Anthony and Scott repeatedly accessed the employee break rooms without being told by the Respondent's management that this was a problem.[9] There was no evidence that non-employee union representatives from the SEIU or the MNA had ever caused a disruption on patient care units or when entering the break rooms where bulletin boards were located. To the contrary, Cahoon, Markey and other officials testified that they were not even aware that this union activity was taking place on a regular basis prior to June 2014.

Individuals have worn purple SEIU shirts and red MNA shirts inside the Respondent's facility on numerous occasions. This had not been challenged by the Respondent prior to June 24, 2014. The Respondent does not claim that it has a dress code applicable to off-duty employees and non-employees visiting the facility's main entryway and cafeteria.

C. Contract Language and Rejected Proposals

At the time of the alleged violations in the case, the contract between the SEIU and the Respondent for the service workers unit contained the following provision:

> Bulletin Boards Available—Union Representative Access
>
> Bulletin boards in the Hospital shall be made available to the Union for the purpose of posting business notices. The business agent for the Union or the employees' designate shall have access at all reasonable times to such bulletin boards, and to such other nonpatient nonpublic areas to be designated by the Hospital to discharge the employee's duties as representative of the Union.

The contracts between the Respondent and the SEIU regarding the other three, much smaller, SEIU-represented units at the facility (LPNs, pharmacists, home healthcare workers) have language that is similar to this.[10]

The record shows that during past contract negotiations both the SEIU and the Respondent have sought, without success, to modify the contract language regarding access to bulletin boards. In January 2014, the multiemployer group, through which the Respondent bargains, proposed to modify the contractual language to provide that the SEIU could only use two bulletin boards specifically designated by the Respondent, that only a single agent of the SEIU would have access to the boards, that the agent would have to give the Respondent 24 hours before posting anything, and that the Respondent had the right to remove postings that it considered inappropriate or unrelated to official union business. The SEIU did not agree to this proposal. For its part, the SEIU, in collective-bargaining negotiations in 2009 and 2012, proposed to modify the contract language to provide that SEIU bulletin boards would be provided in "all designated work areas." Just as the SEIU did not agree to the Respondent's proposal to create new limits on the SEIU's posting activity, the Respondent did not agree to the SEIU's proposal to expand the posting activity.

At the time of the alleged violations, the Respondent's contract with the MNA included the following language regarding access to bulletin boards at the facility:

> The Employer will provide multiple bulletin board spaces in locations accessible to nurses for the posting of meeting notices and related materials.

Despite the fact that the Respondent's officials made statements to both SEIU and MNA representatives regarding areas at the facility "designated" for union activity, the Respondent has not pointed to any language in the MNA agreement that mentions areas "designated" for union activities. In addition, the parties have not shown that either the MNA or the Respondent made proposals to modify the bulletin board language in their agreement.

D. Informational Picketing and Respondent's Planning

The MNA and the SEIU notified the Respondent, on June 4 and June 12, 2014, respectively, that they would engage in informational picketing on public property adjacent to the facility on June 24, 2014. Both Unions informed the Respondent that the purpose of the picketing was "to promote safe staffing levels so that every patient can receive the quality care they deserve." The Respondent's pre-picketing assessment was that the Unions' action would likely attract a large number of picketers, but would have no impact on the facility's ability to provide patient care services and that the Respondent would, from a patient care perspective, operate just like any other day. Cahoon, in a June 18, pre-picketing, memorandum to the facility staff stated, "[the Respondent] has no reason to believe that the picketers will engage in any improper conduct." Both Cahoon and David Abrams—the vice president of human re-

[9] In one instance in February 2011, SEIU steward Lu Hendrickson notified Wesman that the SEIU would be holding a scheduled 2-hour meeting in a particular break room at the facility. Wesman responded that the break room could not be used for that purpose because it was not an area designated by the Respondent for the SEIU's use. Tee Mclenty, executive vice president of the SEIU, responded that the SEIU did not agree with Wesman,s interpretation of where the SEIU could hold meetings.

[10] The provision in the home healthcare workers contract is identical except that it states that the Respondent will make bulletin boards available in both the hospital *and* the home health office. The provision in the LPN contract is similar except that it provides that access to the bulletin will be provided both to the Union and to "duly appointed Stewards." The provision in the pharmacists' contract refers to the availability of "a bulletin board" (singular), rather than of bulletin boards (plural), and states that both the Union and "the duly appointed Steward," shall have access to the board.

sources[11]—testified that this was a true statement. In one written communication leading up to the picketing, Cahoon informed Abrams that he had gotten "one union's full attention," and Abrams responded, "That's because you're one scary dude." Cahoon responded "Boo!"

Jeff Wicklander, the Respondent's vice-president of operations at the time of the picketing,[12] planned to have a number of mechanisms in place on June 24 to control the picketing activity. On that day, the Respondent supplemented his normal security force of 20 uniformed guards with an additional 12 or 13 uniformed guards from a private security company. The Respondent also erected a temporary fence to separate the facility's private property from public property and positioned cameras to face the picketing activity. In addition, the Respondent created a schedule for members of its staff to serve as "greeters" present at three locations inside the facility during the picketing. This was not a regular assignment at that facility. The greeters and the security guards were instructed to, inter alia, approach anyone who entered the facility wearing a red MNA shirt or a purple SEIU shirt, or carrying a sign, and direct such individuals to either cease displaying the shirt/sign or exit the building. The Respondent does not have a standing policy on what non-employees or off-duty employees are allowed to wear at the hospital. According to Wicklander, the objective of these preparations was to prevent the picketing activity from coming inside the facility, to avoid any disruption of day-to-day operations, and to maintain a calm and healing environment.

E. Events of June 23, 2014

On June 23, 2014–the day before the informational picketing—Anthony and Scott arranged to meet in the cafeteria with the intention of working together to place information about the picketing activity on bulletin boards at the facility. When Anthony arrived at the cafeteria, Scott was not present yet and Anthony purchased lunch then sat at a table in the cafeteria and began eating. Anthony was wearing a purple shirt—the SEIU color—but did not display any union signs or other material. He did not circulate in the cafeteria to initiate conversations. He had union information flyers in a closed folder and when an employee approached him with questions about the picketing he would remove a flyer from his closed folder and hand it to the employee. When Scott arrived, Anthony had not finished his meal, and so Scott sat at the table with him and began working on a laptop computer while Anthony ate. Scott had worked on the laptop computer in the cafeteria in the past without being disturbed. During the time that Anthony and Scott were in the cafeteria, a number of employees approached them and engaged in small talk. There were a number of union members at tables near to Anthony and Scott and some of these individuals had union flyers, but the two were not engaging those union members. There were also union flyers on some of these tables and it is likely that these had been left by employees who obtained them from Anthony.

At some point Cahoon and Wesman approached the table where Anthony and Scott were sitting. Cahoon and Wesman were familiar with Anthony, but did not know Scott. At the time they approached, Anthony was talking to Harold Evenson, an SEIU steward, who had asked Anthony a question. Scott was not talking to anyone. Cahoon, said: "Well, Fred, it looks like you are having a meeting here. I am disappointed by that. As you know, there are designated areas for this. You know where those are, where you can go and do this. You can also reserve a meeting room for that purpose." Cahoon asked Scott who he was, and Scott said that he was an MNA organizer. Anthony told Cahoon that he was not having a meeting, but was eating lunch when an off-duty steward asked him a question. For his part, Scott pointed out to Cahoon that he was not, in fact, talking to any MNA members, and Cahoon acknowledged that this was true. Nevertheless, Cahoon maintained that they were having a meeting, noting that Anthony had union flyers with him and that Scott was using a laptop computer. Cahoon opined that it was not a "coincidence" that a representative of the SEIU and a representative of the MNA were together in the cafeteria on the day before the informational picketing. Before leaving the cafeteria, Cahoon stated that he was going to have to think about how to respond to what had occurred and mentioned the possibility that the Respondent would file unfair labor practices charges.[13]

After leaving the cafeteria, Cahoon called McMahon, the MNA representative he was used to dealing with, and complained that that he had encountered Scott and Anthony in the cafeteria the day before the picketing. He reported to McMahon that Scott was behaving politely and not meeting with MNA members. McMahon asked why the representatives' conduct was a problem, and Cahoon responded, "Well, it doesn't seem like a coincidence that they are meeting here together." Cahoon told McMahon that the Respondent "was going to take aggressive action and send a strong message" in reaction to what had occurred in the cafeteria. Cahoon said the he did not know whether on the day of the picketing the Unions would "storm the hospital and disrupt patient care areas." McMahon indicated to Cahoon that this concern was farfetched. Cahoon said, "Well, you never know," to which McMahon responded that he knew that the unions would not storm the facility and disrupt patient care.

After Anthony finished his meal, he and Scott took an elevator up to the top floor of the facility—the seventh floor—with the intention working their way down the floors posting the latest information on the bulletin boards in the employee break rooms. Cahoon and Wesman observed Anthony and Scott waiting for the elevator in the lobby and Cahoon immediately contacted the Respondent's security manager, Rick Ramacher. Ramacher, in turn, used his radio to call for two additional security guards.

Anthony and Scott gained access to the break room on the seventh floor by identifying themselves to personnel at the nurses' station on that unit. Next they went to an employee

[11] Wesman reports to Cahoon. Cahoon reports to Abrams.

[12] Subsequently, in October 2014, Wicklander became the Respondent's president.

[13] The Respondent subsequently filed an unfair labor practice charge that related to Anthony's activities at the facility on June 23. The Respondent's charge was dismissed by the Regional Office of the NLRB and the Respondent's appeal of that dismissal was rejected.

break room that was on a trauma and specialty care unit on the sixth floor. This unit has glass walls so that one can see into the patient rooms from the hallways. Once again, Anthony and Scott gained access to the break room by identifying themselves to a staff member at the nurses' station, in this case a bargaining unit employee. They updated information on the bulletin board in the employee break room on that unit. Then an SEIU member who was on break in the room asked a question about the picketing and Anthony handed that employee some printed material. At this point, Cahoon, Wesman, and Ramacher entered the break room. Cahoon stated that Anthony and Scott were not supposed to be there and that they were conducting union business in a non-designated area. He referenced the discussion earlier that day in the cafeteria and told Anthony, "[N]o matter how much we try, you continue to violate the contract, continue to be in areas that are not designated." One of the Respondent's officials stated that the Robbinsdale police department was being called, and that the Respondent was banning/trespassing both Anthony and Scott from the facility.

From there, the Respondent's officials escorted Anthony and Scott to an elevator and then to the security office on the facility's main floor. They were accompanied the entire way by Cahoon, Wesman, and Ramacher. For some of the route to the security office, Anthony and Scott were also flanked by two uniformed security guards.[14] On the way to the security office, Anthony and Scott passed, and were recognized by, a number of bargaining unit members. Scott repeatedly asked what he had done wrong, and was told either that he was in a part of the hospital where he was not supposed to be, or that it was not a "coincidence" that he and Anthony were together in the hospital on the day before the picketing. A security officer prepared written trespass warnings and the Respondent had an officer of the Robbinsdale Police Department present the warnings to Anthony and Scott. These documents contain identical language warning Anthony and Scott that they were banned from the Respondent's premises for a period of 1 year and would be arrested if they failed to comply with the warning. The documents both provide the following explanation for their issuance: "Conducting business in unauthorized areas & after being told to stay out of public/patient areas." Once they received these documents, Anthony and Scott were both escorted out of the facility by police officers and, at the time of trial, the Respondent had not allowed either to return to the facility. Wesman testified that if either were to return before the expiration of the 1-year period they would be arrested. Cahoon testified that the decision to ban Anthony and Scott was based on the "activity we saw . . . in the cafeteria, and the fact that they were up on a patient care unit."[15]

The Respondent's June 23 efforts to limit the dissemination of information about picketing was not limited to interrupting the activity of non-employee union representatives, but also extended to the activity of an employee, Melvin Anderson. Anderson, an SEIU steward for over seven years, placed a flyer about the informational picketing on the bulletin board in the SPD department where he was assigned. The SPD department is not a patient care area, but rather one where medical instruments are sterilized and organized for use elsewhere in the hospital. Anderson had posted notices on that bulletin board in the past and prior to June 23 the Respondent had never interfered. In fact, Judith Gubbins, the SPD manager, sometimes rearranged the union materials that were on the bulletin board. He had also seen the Respondent post information about its own collective bargaining proposals on the bulletin board. On June 23, however, Wesman contacted Gubbins and told her that the SEIU posting on the SPD bulletin board was impermissible because it was not on an "authorized" bulletin board. Gubbins responded to this by returning the posted union information to Anderson, and telling him that he was not permitted to place such information there. Gubbins told Anderson, however, that it would be permissible for him to post other types of information for employees, such as invitations for free entry to a zoo.

F. Events of June 24, 2014

The next day—June 24—the MNA and the SEIU engaged in joint informational picketing in a public park near the Respondent's facility. At some point that day, Wesman confronted Anderson in the facility's atrium and asked if he was the one who had put SEIU information on the bulletin board in the SPD department.[16] Anderson said that he had posted the information and that "we've been posting on that board since before I was a steward." Wesman accused Anderson of violating the contract. Anderson asserted that his action in posting the information was consistent with past "practice," and Wesman responded "[s]o that means then, I can go ahead and break the contract . . . as long as nobody knows about it." Wesman mentioned that Anthony had been banned from the facility, and asked Anderson whether Anthony was involved in the SPD department posting. When Anderson answered, Wesman challenged Anderson's account by describing what Wesman said he had "watched" Anderson and Anthony doing. Then Wesman con-

[14] Cahoon and Wesman testified that they, along with Ramacher, accompanied Anthony and Scott to the security office, but that there were no other security guards with them. I find the recollections of Anthony and Scott that two security guards accompanied them for portions of the walk more credible than the contrary recollections of Cahoon and Wesman. Anthony and Scott both testified calmly and with certainty and specificity on this point and were not undermined during cross examination. In addition, Wesman himself testified that Ramacher used his radio to call for two more security guards when Anthony and Scott were seen proceeding to patient care floors. Thus it is not surprising that security guards met up with Ramacher and the others when they escorted Anthony and Scott from the patient care floor to the security office. Ramacher was not called to testify.

[15] The Respondent did not give the Unions notice or an opportunity to bargain over the decision to ban Anthony and Scott for a 1-year period, and neither Union has asked to bargain over the ban. By letter dated December 15, 2014, the SEIU asked the Respondent to conduct a telephonic step 2 grievance meeting regarding the ban relating to Anthony, but the Respondent declined to meet telephonically.

[16] The record contains a complete transcript of this conversation. The General Counsel presented the transcript to the Respondent in advance of trial and then modified it based on the Respondent's input. At trial, the transcript was received into evidence without objection. (GC Exh. 23.)

fronted Anderson with statements that Wesman claimed Anthony had made about the SPD department posting. At around this point in the conversation Anderson stated: "I won't post, Matter of fact, I just quit all of it. I'm done with it all. . . . You won, George. Y'all won." Anderson complained to Wesman that union members were paying dues and were entitled to receive information about union activities "that they should be a part of." Wesman responded: "[T]hat's why we have the designated boards. And not only that, we got these two designated areas." Wesman opined that "if you give SEIU one little break, then they just take advantage of it," to which Anderson responded "I haven't taken advantage of nothing." The conversation ended with Anderson stating: "Alright, I just quit. I quit. Period. You won't hear from me from no union stuff. Period. Somebody else can do it. Alright. You won." Wesman said "It's not a win," and Anderson answered "It is. I quit."

That same day, Richard Geurts, an off-duty registered nurse and member of the MNA bargaining unit, entered the facility wearing the same type of red MNA shirt as many of the picketers. Photographs of the picketing indicate that these shirts had the MNA insignia on the front, were blank on the back, and did not bear any picketing slogans or reference to the Unions' criticisms of the Respondent.[17] Geurts was walking alone, and was not carrying signs or noisemakers or chanting. He was in the atrium area on the way to an employee locker room to retrieve his lunch when he was approached by Abrams – a senior human resources executive who helped plan the Respondent's response to the picketing event. Abrams did not recognize Geurts or know whether he was an employee, patient, or family member. Abrams told Geurts that he was not allowed to wear the MNA shirt in the facility that day. Geurts asked Abrams who he was, and Abrams said that he was the Respondent's vice president of human resources. Geurts asked whether Abrams wanted him to take the shirt off right there in the lobby. Abrams either told Geurts to take the shirt off immediately, or said that he did not care whether he did so, and Geurts responded by removing the shirt, leaving him bare-chested in the public lobby. Geurts had a nonunion shirt in his possession and he put that on shortly after removing the MNA shirt, although the testimony indicates that Abrams did not know that Geurts had the second shirt with him. The exchange between Geurts and Abrams was observed by at least one union member, Kevin Morse, and Morse later brought the incident to the attention of union officials. Abrams testified that he believed having Geurts remove his shirt in the public lobby was consistent with the Respondent's purported intent of maintaining a calming and healing environment during the picketing because doing so "create[d] the potential for less disruption than an argument or a confrontation over how the shirt was removed." However, Wicklander conceded that having a person remove his or her union shirt in the entrance area would itself be a "disruptive act" if, like Geurts, the person did not have another shirt underneath.

The balance of the relevant incidents on June 24 concern the Respondent's repeated efforts to restrict the activities of two upper level union officials—MNA president Linda Hamilton and SEIU president Jamie Gulley. These officials had responsibilities that went well beyond the Respondent's facility, but they were present on June 24 because of the informational picketing. The MNA entity of which Hamilton is president has approximately 20,000 members and the SEIU entity of which Gulley is president represents approximately 43,000 individuals.

After participating in the joint picketing during the morning, Hamilton and Gulley entered the facility around mid-day and headed towards the public cafeteria. Hamilton was wearing a red MNA shirt and Gulley was wearing a purple SEIU shirt. They were not chanting or carrying signs, bullhorns or noisemakers. There is no evidence that they were being disruptive. As they walked to the cafeteria, a number of SEIU members approached Gulley with questions about union matters (including about Anthony being banned from the facility), and some employees had brief, inconsequential, interactions with Hamilton. Once in the cafeteria, Hamilton and Gulley purchased lunch and sat at a table. They had not arranged to meet any union members in the cafeteria, but did mean to be available if members wished to approach them with questions, especially since Anthony and Scott had been banned and were not in the facility to answer questions. These conversations did not disrupt anyone else's meals. Wesman, who knew Gulley but did not recognize Hamilton, saw the two in the cafeteria and proceeded to sit down at a nearby table and watch them. A number of union members stopped to ask Gulley and Hamilton questions.

After they finished their meals, Gulley and Hamilton left the cafeteria and walked out towards the main entrance. While walking, Gulley and Hamilton were approached by Morris, who told him that the Respondent had required Geurts to remove his MNA shirt in the lobby. While the three were having this conversation, a uniformed security guard approached and stated that they could not wear their union shirts in the facility. Morris told the security guard that Hamilton and Gulley were the presidents of the MNA and the SEIU. Gulley asked the security guard if he was removing them from the facility for wearing union shirts. The security guard said he would be back shortly, and then walked away. Gulley waited outside a coffee shop near the main entrance while Hamilton visited a restroom. While he was waiting, the security guard returned, along with a second, more casually dressed, security guard, who Gulley understood to be a supervisor. The second security guard told Gulley that he could not be in the facility that day with his union shirt on. He also asked Gulley if he was the individual who had been banned from the facility the prior day. Gulley identified himself to the two guards as the president of the SEIU and asked if they were removing him from the facility for wearing a union shirt and talking to members. The guards said that they would consult with the human resources department, and then they left.

Following this exchange, Hamilton rejoined Gulley and they purchased coffee at the lobby coffee shop. A nurse manager, Germaine Edinger, who was acting as one of the Respondent's special picket-day "greeters" and an agent of the Respondent,

[17] Wicklander stated that all he knew about the MNA shirts that he had decided not to allow individuals to wear in the facility during the picketing was that they were red in color and said "MNA."

approached Gulley and Hamilton in the hallway and asked them to change their shirts or cover them. Gulley responded, "Thank you, no." Then Edinger said "if you are unable to do that that, we would ask . . . that you leave the building, please." She offered to escort them to the exit. Gulley declined the invitation. Then Hamilton and Gulley headed towards the cafeteria with the intention of, once again, being available if union members wished to approach with questions. Hamilton also hoped that their presence in the cafeteria would remind members to participate in the picketing activity. They had coffee with them.

When Hamilton and Gulley arrived at the cafeteria they were surrounded by approximately six security guards, at least one of whom was a supervisor who tried to block their path. The supervisory guard told Hamilton and Gulley that they could not conduct union business in the cafeteria and told them that there were designated areas in the facility for such activities. Hamilton asked him to define "union business." Then Gulley said that he had been having conversations with members in the cafeteria for as long as he had been with the SEIU and that he intended to do what he had "historically done in the past." The supervisor security guard offered to escort them from the premises. Gulley asked if they were removing him from the premises, "because if you are not going to remove us from the premises, then I am going to talk with members." Hamilton and Gulley maneuvered past the security guards and approached a table where between three and seven union members were already seated. Gulley and Hamilton had not arranged to meet with these individuals, but Gulley asked if he and Hamilton could sit down with them and have a break. Someone at the table agreed, and Gulley and Hamilton sat down.

One of the members sitting at the table asked a question, but at that point they were interrupted by Cahoon who approached with Wesman and Security Supervisor Ramacher. Cahoon said that the union representatives and employees could not conduct union business in the cafeteria. Hamilton asked Cahoon what he meant by "union business," but Cahoon did not answer. Ramacher asked if they were "here to cause trouble" and Hamilton responded "absolutely not." Then Ramacher asked if they were "planning to go to the units," and Hamilton replied "no." Someone asked Hamilton to identify herself and she did and explained that she was associated with the MNA. Cahoon told Gulley, "I am very disappointed in you, very disappointed in you for conducting union business in the cafeteria." Gulley responded, "Chill out, Jeff, I am just having a conversation with some members that I know." Cahoon said "Well, are you talking about the Twins, are you talking about union business, just what?" Gulley responded, "Jeff, I think you know that it is illegal for you to ask me that question while I am sitting here with these members." Cahoon stated that, since they were in a public cafeteria, there was nothing to stop him from sitting down next to them. Gulley responded, "That is true, this is a public cafeteria . . . . [b]ut if your intention is to surveil our conversation to determine if I am talking about the Twins or talking about the Union, then that would also be illegal." Then Cahoon sat down three to six feet away from Gulley and monitored his activities. Wesman and Ramacher sat down with Cahoon. After this, the employees who were sitting at the table near Gulley and Hamilton stopped talking and some or all of them left. Then Hamilton and Gulley left the cafeteria and the facility. This visit to the cafeteria lasted about 10 minutes. Both Gulley and Hamilton had, in the past, participated in numerous conversations about union business with off-duty unit members while inside the facility without interference from the Respondent.[18]

G. Melvin Anderson Terminated on June 27, 2014

Anderson worked for the Respondent for eleven years in various capacities, most recently in the SPD department preparing the sterile instrument kits that are used in operating rooms. The Respondent terminated him on June 27, 2014, citing his record of tardiness as the reason. As recounted above, on June 24 (the day of the informational picketing), Wesman initiated a confrontational exchange with Anderson about a union notice Anderson posted on the bulletin board in the SPD department. At the time of his termination, Anderson had been an SEIU steward for 7 years. He was also a member of the SEIU's contract bargaining committee, and one of two employees at the facility who served on the SEIU executive board. As steward, Anderson participated in grievance meetings on behalf of members about five times each month. He had had many union-related interactions with Wesman over the years and the two had sometimes disagreed.

The record shows that while Anderson had significant strengths as an employee, he also had a serious tardiness problem.[19] Anderson's issues with getting to work on time began early in his employment and, despite repeated criticism from the Respondent, those problems persisted with only minor interruptions during his decade plus tenure at the facility. Gubbins, his direct supervisor in the SPD department, credibly testified that tardiness problems were particularly troublesome in that department because of the costly operating rooms delays that could result if sterile instruments were not provided in a timely manner. Anderson's tardiness problem was noted in the annual performance reviews that the Respondent gave him in 2005, 2006, 2007, 2009, 2010, 2011, 2012,[20] and 2013.[21] In approximately April or May 2014, Anderson received his most recent annual review. In this review, Gubbins stated that Anderson had been tardy 89 times during the period—78 times for

[18] As discussed above, the Respondent had once interfered with Gulley in the cafeteria, but that was at a time when he was on leave from his SEIU position and was present in his personal capacity to campaign for union office.

[19] I do not discuss Anderson's record of absenteeism. The undisputed evidence was that discipline for tardiness and discipline for absenteeism proceed along completely separate tracks in the Respondent's system. The Respondent's witnesses stated that Anderson's record of absenteeism was not a factor in the decision to terminate him.

[20] The 2012 evaluation notes that Anderson had been tardy 34 times during the 12-month period, and gives him a rating of "marginal" in the category that encompasses tardiness, but also states that Anderson had shown "significant improvement" in that category.

[21] The 2013 evaluation notes that Anderson had been tardy 38 times during the 12-month period, states that there has been "significant improvement" since a suspension was imposed, but gives him the lowest rating, i.e., "not acceptable," in the category that encompasses tardiness.

less than 5 minutes and 11 times for more than 5 minutes—which was more than twice the number of instances reported in his 2012 and 2013 evaluations. He received the lowest rating, i.e., "not acceptable," in the category that covered tardiness. In the comments section of the 2014 evaluation, Gubbins wrote:

> Melvin and I have had numerous conversations about his tardiness. Melvin understood that he is in violation of the established Tardiness Guidelines . . . and agreed to hold himself accountable to arrive at work on time following his suspension.
>
> After review of the 12 month attendance calendar there is little evidence of signs of improvement, and he continues to be in violation of the Tardiness Guidelines. Melvin has had only two pay periods in the past 12 months when he has been on time to work every day. The expectation is to be changed and in the department at the start of his shift.
>
> It is my responsibility to notify Melvin immediately that this behavior is unacceptable and is in violation of the established Tardiness Guidelines. Acountability and Teamwork are both important values and expectations to achieve both for himself and the Team he is part of.

An attachment to the evaluation noted that Anderson needed to "improve immediately" and that the target date for improvement was "now." General Counsel Exhibit Number (GC Exh.) 29 (Individual Development Planning Template). These comments were more pointed on the subject of tardiness than had been those appearing in any of the eight prior evaluations that were made part of the record. However, Anderson received favorable ratings in most of the areas covered by the same 2014 evaluation. Gubbins gave Anderson the highest possible rating—"mastery"—in the Teamwork/Partner category and the second highest rating—"solid"—in the three remaining categories.

The Respondent also issued tardiness-based discipline to Anderson on several occasions. This discipline included a written warning on January 7, 2008, a verbal warning on January 25, 2011, verbal warnings on April 18 and June 13, 2012, a written warning on July 10, 2012, a written warning on November 30, 2012, and a 1-day suspension on July 1, 2013.[22] All of these disciplinary notices list both the number of times Anderson was late by over 5 minutes and the number of times he was late by less than 5 minutes. The 2008 disciplinary notice warned Anderson that "Discernible patterns of tardiness may serve as an indication of an absenteeism problem and may result in an acceleration of the Formal Performance Improvement process."

The Respondent's tardiness guidelines, which were mentioned in Anderson's disciplinary notices and of which he was aware, have been in effect since at least April 5, 2008. The guidelines include a chart setting forth the number of times that an employee who, like Anderson, is working full-time can have tardiness "occurrences" of 5 minutes or more before triggering various levels of discipline. That chart indicates that a full-time employee will be subject to: coaching at 6 occurrences; a verbal warning at 9 occurrences; a written warning at 12 occurrences; a suspension without pay at 15 occurrences; and termination at 18 occurrences. This disciplinary chart does not indicate that any level of discipline is appropriate based on tardiness of less than 5 minutes, however, the guidelines include the following language:

> For the purpose of performance improvement, any clocking 5 minutes or later than the scheduled start time will be considered serious and subject to the Formal Performance Improvement process. Clocking in less than 5 minutes will be addressed during the annual performance appraisal. However, a discernible pattern of lateness less than 5 minutes may also be addressed through the Formal Performance Improvement Process. Tardiness will be tracked on a rolling 12 month period, counting back from the most recent occurrence or tardiness.
>
> Consideration may be given for prior attendance and/or work history, any unrecognized FMLA issues, or any unknown or special considerations that may be presented.

GC Exh. 25(b) (emphasis in original). These tardiness guidelines are not part of the collective bargaining agreement covering the unit of which Anderson is a member.

On June 9, 2014, Gubbins began to explore the possibility of assessing additional discipline for Anderson's ongoing tardiness. The record shows that despite the warning contained in the performance evaluation that Anderson received in May 2014, he continued to have tardiness problems in May and June. The record shows that he was tardy on May 5, 7, 14, 26, and 29, and on June 4, 9, and 11.[23] In a number of these instances he was late by less than 5 minutes, but in others he was considerably later. At the same time the records are reasonably read as showing at least some improvement in this regard. Anderson's May performance evaluation stated that he had been tardy a total of 89 times during the preceding 12 months, while his June termination notice stated that he had been tardy a total of 80 times during the 12 months preceding June 13, 2014.

On June 9, Anderson clocked in 45 minutes late, and it was that day that Gubbins sent an email to Stacey Sylvester, who oversaw attendance matters for the Respondent, and asked for advice on whether the appropriate discipline was a written warning or another suspension. In the email, Gubbins noted the 45-minute tardiness, and also stated that Anderson had been more than 5 minutes late on 12 occasions during the last rolling 12-month period. The next day, Sylvester told Gubbins that what was appropriate under the tardiness guidelines was a written warning, unless it should be "bumped up to another suspension" given that he had already been suspended once. She suggested that Gubbins contact Wesman since Anderson "is in the . . . union." The next day, June 11, Gubbins forwarded to Wesman the email exchange with Sylvester in which Gubbins

[22] The July 1, 2013, suspension document references a prior suspension on January 9, 2013, but the record does not contain a disciplinary document for a January 9 suspension and does not establish whether any such suspension was based on tardiness.

[23] The record does not show exactly when in May the annual evaluation was presented to Anderson, and it is not possible to tell how many of the instances of tardiness in May occurred after that evaluation.

and Sylvester had discussed the possibility of imposing either a written warning or a suspension. Gubbins asked Wesman for his recommendation. Wesman responded later that day by requesting additional information about Anderson's tardiness record, and Gubbins supplied that information. After receiving the information, Wesman, in a June 11 email, asked Gubbins "What would you like to do?" He did not make a recommendation about the appropriate level of discipline or suggest that the range of discipline that Gubbins and Sylvester had been considering (written warning or suspension) was too lenient. In a June 12 email, Wesman reminded Gubbins that "tardiness is separate from attendance and has to be handled separately," but, once again, he did not make a recommendation or suggest that the range of discipline being discussed was too lenient.

On June 19, Gubbins again contacted Sylvester by email, asking whether Anderson could be suspended for 2 days at this point given, inter alia, that he was suspended previously, his tardiness record was "not good," and he had been attempting to excuse absences by using Family and Medical Leave Act (FMLA) leave at a time when he had exhausted his FMLA allotment. Sylvester indicated she needed more information. On June 25, Gubbins sent an email to Sylvester supplying some additional information and proposing to suspend Anderson without pay for 2 days. That email stated in part:

> With 13 occurrences of tardy greater than 5 minutes and 71 less than 5 minutes where do we go from here[?] Based on the guidelines can we do a 2 day unpaid suspension? Since there is a discernible pattern of consistently being late. If so, send me the paperwork. When I asked George [Wesman], he asked me what I wanted to do[.] I want to move forward as this is not fair to his co-workers.

Sylvester again indicated that she thought Gubbins should consult with Wesman

Later on June 25, Gubbins forwarded a draft disciplinary notice to Wesman that would have imposed a 2-day unpaid suspension on Anderson for tardiness and in the transmittal email asked "How does this look to you?" Wesman responded 16 minutes later, stating: "Judy, I do not agree. Termination is more than warranted and we will lose consistency when others are terminated for much less." This June 25 email from Wesman was the first time in the record where the possibility of terminating Anderson for tardiness was mentioned in any of the discussions leading to the action.[24] This email was sent just one day after the confrontational exchange that Wesman initiated with Anderson about a union posting on the SPD bulletin board, and also a day after the informational picketing. The record indicates that Anderson had not been tardy at all between June 12 (when Wesman did not challenge the range of discipline being considered by Gubbins) and June 25 (when Wesman challenged that level of discipline as insufficiently harsh and suggested that only termination would suffice).

After receiving Wesman's advice that Anderson be terminated, Gubbins forwarded the email chain to her supervisor, Kendall Hicks and asked: "George [Wesman] is suggesting termination after reviewing the attached. The grid says termination at 18 occurrences but the significance of the <5 minute occurrences is a discernible pattern??" Gubbins was not required to follow Wesman's advice about what level of discipline she should impose. In this case, however, without waiting to hear back from Hicks, Gubbins changed her draft discipline from a 2-day suspension to the termination that Wesman recommended. Gubbins testified that, in her view, what made Anderson worthy of termination was that even after Anderson's most recent performance evaluation he had continued to be tardy, including for 45 minutes on one occasion. Gubbins denied that Wesman, or anyone else in management, told her that Anderson should be terminated because of his union activity (as opposed to his tardiness), or that Anderson's union activity influenced her own decision. She did not, however, claim that she would have terminated Anderson if Wesman had not objected to her plan to impose a lesser level of discipline.

On June 25, Gubbins forwarded a copy of a draft termination notice for Anderson to Wicklander. Under the Respondent's procedures, Gubbins was required to obtain Wicklander's approval prior to suspending or terminating a supervisee. Later that day, Wicklander responded "I support." When Gubbins verbally communicated this to Hicks, Hicks stated that he had not yet reviewed Gubbins' email asking him about the appropriate level of discipline, but that Gubbins should proceed with the termination given that Wicklander had approved it. The termination notice stated, inter alia:

> Since your last Formal Performance Improvement (Suspension) on tardiness on July 13, 2013 you have had **11** more occurrences of coming to work late 5 minutes or greater and **69** occurrences less than 5 minutes. We have been more than patient with you and have allowed you ample time to correct your tardiness problem. The **80** occurrences in which you have come to work late meets or exceeds the maximum number allowed per the tardiness guidelines for a 80 h[ours]p[er]p[ayperiod] full time employee to be suspended.
>
> Due to your continued pattern of tardiness your employment at N[orth] M[emorial]H[ealth]C[are] is being terminated immediately.

The termination notice was identical to the draft suspension notice that Gubbins had originally prepared, except for those portions discussing the level of discipline being imposed. Although the termination was not prepared until June 26, it was dated June 16 because that was the end of the most recent pay period, and Gubbins was basing Anderson's tardiness figures on

[24] Gubbins gave vague testimony that it is possible to construe as stating that Wesman had recommended termination at some point "between June 12 and June 25." Upon carefully reviewing this testimony, I conclude that it does not indicate that Wesman recommended termination prior to June 25 because "between" June 12 and June 25 may reasonably be understood as encompassing June 25. Also the question to which Gubbins was responding when she stated that Wesman recommended termination was "What discipline did Mr. Wesman think was appropriate for Mr. Anderson?" That question does not expressly, or by reasonable inference, refer back to the prior testimony about the June 12 to June 25 period. (See Tr. at 577 LL. 2 to 7.)

the 12-month rolling period that ended on June 13, 2014.[25]

On June 27, Gubbins brought Anderson to her office and told him that he was terminated for tardiness. Anderson responded that he did not believe his tardiness record justified termination under the tardiness guidelines. Gubbins said, "Melvin, we are not terminating you for occurrences, we are terminating you for a pattern of tardiness." Anderson asked for a copy of the documentation that the Respondent was relying on. Gubbins provided a printed spreadsheet that noted, inter alia, Anderson's clock-in time for every workday from June 17, 2013, to June 13, 2014. Anderson made handwritten notes recording the date and clock-in time of instances when the documentation indicated that he had been tardy during the 12-month period. Anderson's notes show approximately 80 instances of tardiness during the 12-month period, of which 11 were "occurrences" of 5 minutes or more. The SEIU grieved Anderson's termination and Wesman denied that grievance. In an email dated August 20, 2014, the SEIU asked to move the matter of Anderson's termination to arbitration, but neither side has requested an arbitration panel.[26]

The Respondent and the General Counsel both presented evidence regarding the Respondent's treatment of other employees who had records of arriving late for work. Of the six employees that the Respondent introduced evidence about, two were terminated. The disciplinary document for one of the terminated employees is dated January 22, 2011, and notes that the employee had been suspended for tardiness on December 6, 2010, and that during the 6–7 week period since then had been late by 5 minutes or more an additional nine times. (R. Exh. 70.) The disciplinary notice states that the individual had been tardy a total of 35 times during the last 12 months, but it is not clear whether this refers only to tardiness of 5 minutes and greater, or to all instances. The other termination notice, dated March 20, 2012, states that during the past 12 months the individual had been late by 5 minutes or more on 35 occasions, and had a total of 79 instances of tardiness. (R. Exh. 69.) Previously, on July 1, 2011, the Respondent had issued this same employee a disciplinary notice stating that she had been late by 5 minutes or more on 62 occasions during the past 12 months. At that time the Respondent did not terminate the employee but warned that she would be terminated the "next time she is late or doesn't punch in." In addition, on April 5, 2011, the Respondent imposed a 3-day unpaid suspension on this employee, stating that during a period of approximately 8 months, she had been late by more than 5 minutes a total of 44 times, and by less than 5 minutes 24 times. The Respondent issued a written warning dated April 16, 2009, to a third employee, this time stating that the employee had, during the past 12 months, been late by 5 minutes or more 15 times, and late by less than 5 minutes 33 times. (R. Exh. 67.) A fourth employee received a suspension notice on February 17, 2012, which stated that the Respondent had previously given her a written warning for tardiness, and yet during the past five pay periods—a period of 10 weeks—she had been late a total of 21 times of which 10 were for 5 minutes or more. A fifth employee received a 1-day, unpaid, suspension dated June 16, 2012, and the suspension notice stated that the employee had received two prior written warnings, and that during the past 4 months she had been late by 5 minutes or more 17 times and by less than 5 minutes an additional 23 times. R. Exh. 72. The sixth employee received a written warning for tardiness, dated July 16, 2014, which stated that the Respondent had twice before met with her about the issue and that from June 6 to July 11 she had been late by more than 5 minutes four times and late by less than 5 minutes five times. Wesman did not recommend a more severe level of discipline than the supervisor proposed in any of these instances. Human resources, the area in which Wesman works, is consulted about discipline for tardiness, but it is not clear in how many of the above instances Wesman performed a review.

The General Counsel submitted disciplinary records regarding a number of employees who had problems with tardiness in 2013 and 2014, but were not terminated. (GC Exh. 32.) One employee received a written warning on July 16, 2013, which stated that she had had 15 occurrences of tardiness in a 12-month period. The warning does not state whether this only included tardiness of greater than 5 minutes, or whether it included all tardiness. A second employee received a written warning dated November 3, 2014, which stated that she arrived an hour and 20 minutes late for work that day and that she had five occurrences in the past year. A third employee received a verbal warning on July 8, 2014, which stated that she had received prior "informal and formal performance improvement" because of tardiness, but that she had eleven "occurrences" of tardiness in the past 12 months. A fourth employee received a verbal warning dated October 8, 2013, stating that during a period of less than 3 months she had been over 5 minutes late for work 16 times, and 1 to 5 minutes late 27 times. In the case of a fifth employee, the Respondent issued a written warning dated December 11, 2013, which stated that during a period of less than 3 months the employee had been late to work by 5 minutes or more on nine occasions and 1 to 4 minutes late on 16 occasions. A sixth employee was terminated on July 16, 2014, after being tardy 74 times since May 6, 2013. The termination notice does not state whether all of these are occurrences of greater than 5 minutes or more. Prior to being terminated, this employee received a "last and final warning."

The record shows that during the period leading up to Anderson's termination there were a number of other union stewards at the facility and none of the other stewards was disciplined or discharged at around the same time. The record does not show, however, that any of the other stewards had either recently been confronted by Wesman about their union activities or were known by Wesman to be actively involved in preparations for the informational picketing.[27] Nor was it shown

[25] The disciplinary documents in the file include other instances where, as with Anderson, tardiness-related discipline was dated days, or weeks, prior to the date the discipline was presented to the employee.

[26] Under the collective-bargaining agreement covering Anderson, both the SEIU and the Respondent had the right to submit the grievance to arbitration.

[27] In its brief, the Respondent asserts that all of the other union stewards were promoting the informational picketing activity. R. Br. at 77. However, the record citation that the Respondent provides for this—Tr. 687–688—does not support it. Indeed that portion of the record does

that, during the period around June 2014, Wesman had been consulted about discipline proposed for any of the other stewards.

The Respondent's tardiness guidelines explicitly call for consideration of the employee's work history in assessing discipline for tardiness. Neither Gubbins nor Wesman explained what, if any, consideration was given to Anderson's strengths as an employee (a number of which Gubbins acknowledged) or his long tenure with the Respondent. Wesman testified that "we try to be as fair as we can," and take into account "individual circumstances" such as length of service and whether the tardiness took place over a long period of time, but did not state if, or how, this was done in Anderson's case. When initially asked whether the Respondent considered the quality of an employee's work when deciding on discipline for tardiness he answered "[n]o," but when pressed he said that whether or not the Respondent takes the employee's work quality into account "depends" based on "[m]anagerial discretion and, yes, HR would be consulted."

H. Respondent Prevents Anderson from Engaging in Union Activity in the Cafeteria on August 21, 2014

After the Respondent terminated Anderson, the SEIU hired him as an internal organizer. SEIU assigned him to four facilities, including the Respondent's—rom which management had recently banned Anthony. Anderson entered the Respondent's facility in the afternoon on August 21, 2014, and proceeded to the cafeteria. He brought a small, rolling, backpack in which he had various union flyers and materials. As he walked, he talked to employees and in some cases handed them union materials. He purchased a cup of coffee in the facility's lobby and then proceeded to the cafeteria where he sat at a table at which a number of SEIU members were present. While still in the cafeteria, Anderson noticed an employee, Linette Combs, with whom he was not acquainted and who was sitting alone having lunch. Anderson approached her and said, "I never met you before, you must be new." He told her his name and said that he was an internal organizer with the SEIU. Combs was, in fact, a new employee and neither she, nor Anderson, knew whether the SEIU represented her.[28]

Anderson had been speaking to Combs for about 5 minutes, a conversation that Combs testified was not unpeaceful, when Wesman approached them. No one else was in the immediate vicinity. Wesman did not introduce himself to Combs, but asked to speak to Anderson. Anderson indicated that he needed some time to wrap up his conversation with Combs and gather his things. Anderson gave Combs his business card and union flyers. Then Anderson said that Wesman should speak to him in front of Combs so that she could witness what was said.[29] Wesman told Anderson that he wanted to talk in private and Anderson followed Wesman towards the exit of the cafeteria. Wesman told Anderson that he was "not allowed to conduct union business and activities in the cafeteria." Anderson said that he was acting consistently with "a long standing practice," and Wesman countered that "[w]e have never allowed the unions in our cafeteria." Wesman stated that the Respondent was "not going to tolerate [Anderson's] continued breaking of the contract, and holding meetings in the cafeteria," and that this was going to be Anderson's "final warning" and that if he continued he "would be trespassed and arrested." On the way out of the cafeteria a former co-worker of Anderson's indicated curiosity about what was going on and Anderson answered that he was "being kicked out." Once Wesman had led Anderson from the cafeteria, a security guard escorted Anderson out of the facility. Other than this incident, no manager or supervisor had ever interfered with Anderson's conversations in the cafeteria or told him what he could or could not talk about there. Employees frequently discussed matters involving the SEIU while they were in the cafeteria, and one such employee, Chelsa Boyd, credibly testified that she was not aware of any restriction on what they talked about there.

In the immediate aftermath of this incident, Wesman identified himself to Combs and had her turn over the flyers that Anderson had provided.

I. Complaint Allegations

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act: on about February 10, 2014, by denying an SEIU representative access to a bulletin board designated for use by the SEIU in the unit known as "4SW"; on June 23, 2014, when Cahoon threatened a representative of the SEIU, a representative of the MNA, and employees, that they were prohibited from engaging in union discussions in the cafeteria and threatened to file charges if discussions about unions continued; on June 23, 2014, when Cahoon, in a break room and in the presence of employees, threatened representatives of the SEIU and the MNA that they were engaged in trespass by entering the break room and posting information on a bulletin board there; on June 23, 2014, by removing SEIU representative Anthony and MNA representative Scott from its facility and banning them from the facility for one year; on June 23, 2014, when Gubbins prohibited an employee from posting information relating to informational picketing on a bulletin board in the SPD area; on June 24, 2014, when the Respondent, by its security guards, surrounded and followed representatives of the SEIU and MNA in order to interfere with their ability to meet and talk to employees; on June 24, 2014, when the Respondent's security guards and two of its nurse managers, in the presence of employees, threatened representatives of the SEIU and the MNA that they had to leave the hospital because they were wearing shirts with union insignia on them; on June 24, 2014,

not show that Wesman believed any other steward was involved in promoting the picketing and certainly does not show that he believed any were as actively involved as he knew Anderson to be. See Ibid. (Wesman is asked whether any of the other stewards were involved in union activities leading up to the informational picketing, and he responds "They may have been.").

[28] Combs was not, in fact, represented by the SEIU.

[29] Anderson claimed that Wesman was loud and acted in a physically aggressive manner during this exchange, but Wesman denies that. Combs' testimony was supportive of Wesman in this regard, and Chelsa Boyd, a friend of Anderson's who was present in the cafeteria, gave testimony that lent support to Anderson's account. After reviewing the testimony, and considering the demeanor of the witnesses, I do not find a basis for crediting Anderson's and Boyd's accounts over Wesman's denial and Comb's testimony supportive of that denial.

when Cahoon prohibited representatives of the SEIU and the MNA from discussing those unions with employees in the cafeteria; on June 24, 2014, when Cahoon and Wesman engaged in surveillance of employee union activity in the cafeteria; on June 24, 2014, when Abrams, in the facility lobby, instructed an employee to immediately remove an MNA shirt, thereby requiring the employee to walk shirtless to the locker room; on June 24, 2014, when Wesman interrogated an employee about union activities, including whether the employee posted information about informational picketing, and threatened that the employee's union activities were under surveillance; and on August 21, 2014 when Wesman, in the cafeteria and in the presence of employees, threatened to have an employee/union representative arrested if he conducted union business in the cafeteria again, and had the employee escorted out of the facility by security guards.

The complaint also alleges that through much of the same conduct alleged to violate Section 8(a)(1), the Respondent also violated Section 8(a)(5) and (1) because that conduct constituted changes in terms and conditions of employment about which the Respondent had not bargained in good faith. Specifically, the complaint alleges that the Respondent violated Section 8(a)(5) and (1): on about February 10, 2014, when it denied an SEIU representative access to a bulletin board designated for use by the SEIU in the area known as "4SW" without giving the SEIU notice and an opportunity to bargain; on June 23, 2014, when Cahoon, in the cafeteria, prohibited a representative of the SEIU, a representative of the MNA, and employees from engaging in union discussions, without giving the SEIU and the MNA notice and an opportunity to bargain; on June 23, 2014, when Cahoon, in a break room and in the presence of employees, stated that representatives of the SEIU and the MNA were engaged in trespass by entering the break room and posting information on a bulletin board there, without giving the SEIU and the MNA notice and an opportunity to bargain; on June 23, 2014, when the Respondent removed SEIU representative Anthony and MNA representative Scott and from its facility and banned them from the facility for one year without giving the SEIU notice and an opportunity to bargain;[30] on June 23, 2014, when Gubbins prohibited an employee from posting information in the SPD area without giving the SEIU notice and an opportunity to bargain; on June 24, 2014, when Cahoon prohibited representatives of the SEIU and the MNA from discussing union matters with employees in the cafeteria without giving the SEIU and the MNA notice and an opportunity to bargain; and on August 21, 2014, when Wesman threatened to have an employee/union representative arrested if he conducted union business in the cafeteria again, without giving the SEIU notice or an opportunity to bargain.

The complaint also alleges that the Respondent violated Section 8(a)(3) and (1) on June 27, 2014, by terminating Anderson because of his protected union and concerted activities.

III. ANALYSIS AND DISCUSSION

A. Deferral Argument

The Respondent contends that, under *Collyer Insulated Wire*,[31] I should defer every one of the numerous claims alleged in the complaint to resolution through the parties' grievance and arbitration process. The General Counsel counters that none of the claims are appropriate for deferral. Whether deferral to arbitration is appropriate is a threshold question that must be decided in the negative before the merits of the unfair labor practice allegation can be considered. *L.E. Myers Co.*, 270 NLRB 1010, 1010 fn. 2 (1984). The deferral defense and the merits may be addressed in the same hearing and the same decision, see, e.g., *Faro Screen Process, Inc.*, 362 NLRB No. 84 (2015), and that is what I do here.

The Board has stated that deferral is appropriate when the following factors are present:

> (1) the parties' dispute arises within the confines of a long and productive collective-bargaining relationship; (2) there is no claim of employer animosity to the employees' exercise of Section 7 rights; (3) the parties' agreement provides for arbitration in a very broad range of disputes; (4) the parties' arbitration clause clearly encompasses the dispute at issue; (5) the party seeking deferral has asserted its willingness to utilize arbitration to resolve the dispute; and (6) the dispute is well suited to resolution by arbitration.

San Juan Bautista Medical Center, 356 NLRB 736–737 (2011); *Wonder Bread*, 343 NLRB 55, 55 (2004).[32] Deferral is not appropriate in the instant case because the second, fourth, and sixth factors set forth by the Board are not present. Regarding the second factor, this is decidedly not a case where there is no claim of animosity to employees' exercise of Section 7 rights. Rather, the General Counsel explicitly claims that the Respondent's conduct was an example of "over-the-top animus toward these unions and toward the employees' Section 7 rights." (Tr. at 11.) The General Counsel argues that the Respondent reacted to the SEIU's and MNA's unprecedented joint picketing activity by "escalating its animus-driven conduct" and committing "a catalog of 8(a)(1) surveillance, interrogation, threats, interference" and other violations directed at the Unions' protected activities at the facility. (Tr. 8ff.) In addition, the claim that Anderson was discriminatorily discharged because of his union and protected concerted activities encompasses an allegation that the Respondent was motivated by unlawful animus towards those activities.[33] According to the General Counsel's theory, Anderson was discharged as part of a wave of animus-

[30] The complaint alleges that the Respondent failed to meet its bargaining obligations to the SEIU in violation of Section 8(a)(5) and (1) when it removed and banned SEIU representative Anthony and MNA representative Scott. The complaint does not allege that this conduct violated the Respondent's bargaining obligation with respect to the MNA, even though one of the two banned individuals was an MNA representative.

[31] 192 NLRB 837, 839 (1971)

[32] In *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132 (2014), the Board made certain modifications to the standards for deferral to arbitration, but stated that the new standards would generally only be applied prospectively and not to cases, such as the instant one, that were already pending at the time the change was announced.

[33] See *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983).

driven conduct occasioned by the joint picketing and which was directed at Anderson because of his known protected activities as a union steward and official, including those in support of that picketing. See *Mobil Oil Exploration & Producing*, 325 NLRB 176, 177–178 (1997) (deferral is not appropriate when the precipitating event leading to an employee's termination is the employee's protected activity), enfd. 200 F.3d 230 (5th Cir. 1999); see also *Nissan Motor Corp.*, 226 NLRB 397 fn. 1 (1976) (the very nature of a case dictates nondeferral when it involves discipline of steward in reprisal for grievance activities). It is not clear to what extent I am required to weigh the evidence relating to animus at this point, as opposed to simply noting that the General Counsel claims animus, since that evidence goes to the merits of the complaint and whether deferral is appropriate is a pre-merits inquiry. At any rate, for the reasons discussed in the section of this decision analyzing the merits, there is ample evidence that the Respondent bore animus towards the union activities of the SEIU and MNA.

The sixth factor set forth by the Board is also not met because the disputes are not well-suited to resolution by arbitration. "A dispute is well suited to arbitration when the meaning of a contract provision is at the heart of the dispute." *San Juan Bautista*, supra; see also *Collyer*, 192 NLRB at 842. Deferral is not appropriate when any contract provisions that are involved are unambiguous. Ibid. The majority of the complaint allegations in this case revolve around the Respondent's efforts to prohibit employees and non-employee representatives from engaging in union activities in the facility's cafeteria, lobby, and bulletin board areas. Contract language is not at the heart of those allegations. Contrary to the Respondent's suggestion, neither the SEIU contracts nor the MNA contract contains any language whatsoever that prohibits the Unions from accessing those, or any other areas, at the facility for the purpose of engaging in union activities. The contractual provisions that the Respondent relies on to justify the prohibitions do not state limitations on union activities, but rather impose affirmative duties on the Respondent to provide certain access. Specifically, the contracts with the SEIU require the Respondent to provide access at all reasonable times to bulletin boards at the facility and to "nonpatient nonpublic" areas "designated" by the Respondent for purposes of the SEIU's representational activities. Likewise, the contract with the MNA obligates the Respondent to "provide multiple bulletin board spaces in locations accessible to nurses for the posting of meeting notices and related materials." These provisions do not set forth prohibitions on union activity at the facility or indicate that the affirmative obligations that the Respondent is agreeing to undertake are in derogation of any of the rights that the SEIU, the MNA, and unit employees have under Section 7, Section 8 (a)(1), (3) and (5) of the Act or relevant case law.

To the extent that the Respondent means to suggest that statutory access rights have been implicitly surrendered by the failure of the parties to mention them in the contracts, that argument is foreclosed by the Board's holding that Section 7 rights are "not waived by their absence from the governing collective-bargaining agreement," *Chevron U.S.A., Inc.*, 244 NLRB 1081, 1085 (1979), and that a labor contract will not be seen as surrendering such rights "unless" such surrender is "expressed in clear and unequivocal language," *Textron Puerto Rico*, 107 NLRB 583, 587 (1953). See also *Johnson-Bateman Co.*, 295 NLRB 180, 184 (1989) ("It is well settled that the waiver of a statutory right will not be inferred from general contractual provisions; rather, such waivers must be clear and unmistakable."). The contract language pointed to by the Respondent does not even suggest the surrender of such rights, much less express such surrender in the necessary clear and unequivocal language. In fact, Bialke, writing to the Respondent on January 24, 2014, emphasized that the SEIU had never "given up our rights under the National Labor Relations Act to have access to public areas and specifically the cafeteria." This is not to say that the Respondent is foreclosed from arguing that it can lawfully restrict protected activities in certain areas of the facility, but only that the question must be analyzed under the relevant statutes and case law and does not present a legitimate dispute about the interpretation of contract language. Disputes such as these, which turn primarily on the interpretation of statute and case law are not, "eminently well-suited to resolution by arbitration," and are not deferred by the Board. *Avery Dennison*, 330 NLRB 389, 390–391 (1999) ("The Board's policy against deferral in matters of statutory interpretation is well established. Moreover, established Board policy also disfavors bifurcation of proceedings that entail related contractual and statutory questions, in view of the inefficiency and overlap that may occur from the consideration of certain issues by an arbitrator and others by the Board.").

In reaching the conclusion that the disputes at issue here are not suited to arbitration, I considered that the General Counsel has stated that the Respondent, by prohibiting nonemployee union representatives from accessing employee break rooms and updating the union information on bulletin boards, made a unilateral change from the established practice under the contractual language. However, while this argument references the contractual language, its resolution does not turn on that language, which sheds no meaningful light on the subject. While the SEIU and MNA contracts both discuss access to bulletin boards, neither includes any language providing that the Unions may access every bulletin board at the facility or identifying which bulletin boards are available for the Unions' use. Nor do those contracts make any reference to break room access. Indeed, in the case of the MNA, the contract language only discusses *nurses* having access to bulletin boards, and does not discuss non-employee MNA representatives such as Scott. The question of whether the Respondent made a unilateral change by prohibiting the SEIU and MNA from accessing particular break rooms and bulletin boards turns on the evidence regarding the employees' past practice not on the interpretation of ambiguous contract language.

Contractual language is also not at the heart of the dispute relating to the Respondent's decision to terminate Anderson. Resolution of that claim does not require interpretation of an ambiguous contract provision, but rather analysis of the evidence of discrimination and of the Respondent's explanation for the termination. There is a contract provision in the SEIU contract for the service workers unit that prohibits discrimination against an employee on the basis of "membership or nonmembership in the Union," but that is too narrow to cover

the claim regarding Anderson's termination. The General Counsel is not contending that Anderson was discriminated against solely for being a member of the SEIU, but rather that he was discriminated against because of his extensive activism on behalf of the SEIU.[34] Moreover, the Respondent's tardiness standards are not set forth in the collective-bargaining agreement.

The factor requiring that the employer's arbitration clause clearly encompass the dispute is not met either. The grievance and arbitration procedures set forth in the SEIU contracts covering the large service workers unit and the home health workers unit provide that that process is available for disputes "relating to the interpretation of or application of the express terms and provisions of" the contract. The SEIU contracts covering the LPN unit and the pharmacists have similar language, which limit application of the procedure to disputes "relating to the interpretation of or adherence to the terms and provisions" of the contracts. Similarly, the grievance and arbitration provision in the contract with the MNA provides that it applies to "any controversy arising over the interpretation of or the adherence to the terms and provisions of this Agreement." As discussed immediately above, the disputes over access that give rise to most of the complaint allegations are not about the interpretation and application of ambiguous provisions in the contract, but rather over the evidence regarding past practice and the alleged changes to that practice, and the interpretation of the relevant legal authority. Moreover, even if one assumes that the 8(a)(5) allegations regarding access to particular bulletin boards and break rooms is encompassed by the contractual arbitration clauses, that would not mean that the grievance/arbitration process would cover the 8(a)(1) allegations that the Respondent used threats, interrogation, surveillance, and trespass/bans to pressure nonemployee union officials to limit their Section 7 activities, nor would the arbitration process provide a remedy for any such violations. Therefore, the claims regarding access presented here are not clearly encompassed by the grievance and arbitration procedures in the SEIU and MNA contracts.

Regarding the claim that the Respondent's discharge of Anderson was discriminatory in violation of Section 8(a)(3), the same conclusion is appropriate. I considered that the collective bargaining agreement that applies to Anderson states that discharge decisions may be challenged through the grievance/arbitration process as being "without just cause." (See GC Exh. 2 at 25, art. 9.) However, that inquiry would only go part of the way towards resolving the question, presented by the complaint, of whether discrimination in violation of the Act led the Respondent to discharge Anderson. Indeed, even if in the grievance process the Respondent were to show that a nondiscriminatory reason sufficient to justify Anderson's discharge exists (in other words that "just cause" exists) that would not rebut a prima facie case of discrimination unless the employer showed that it would, in fact, have discharged Anderson on that nondiscriminatory basis absent his union activities. *Monroe Mfg.*, 323 NLRB 24, 27 (1997). Likewise, even if the Respondent could not establish that just cause existed for Anderson's discharge, that would not mean that the evidence showed that the real reason was Anderson's union activity.

Finally, I doubt that this dispute can fairly be characterized as occurring within the confines of a long and productive collective-bargaining relationship. The SEIU and the Respondent have had a collective bargaining relationship since the 1940s, and it is fair to assume that this relationship has been productive at various times, but the record suggests that when the violations are alleged to have occurred the relationship had taken a decidedly unproductive turn. The relationship between the Unions and the Respondent had deteriorated to the point that within the matter of a few days around the June 24 picketing the Respondent decided it was necessary to, inter alia: ban organizers for the SEIU and the MNA from the facility under threat of arrest; discharge a union steward who was on the SEIU's executive committee and bargaining committee; and attempt to eject the presidents of the SEIU and the MNA from public areas of the facility and interfere with and monitor those officials' conversations with union members. Regardless of whether one believes that the Respondent's actions were justified, such clashes are hard to square with the existence of a productive current relationship. Moreover, during the same few days, the Respondent's director of employee and labor relations told an MNA official that he was preparing for the possibility that the unions might "storm" the hospital and "disrupt patient care areas" and the Respondent's labor representative chastised an SEIU steward by stating, inter alia, that if you "give SEIU one little break, then they just take advantage of it." These circumstances indicate that the relationship between management and the Unions had become toxic at the time of the alleged violations.

The only one of the six factors that is clearly present here is the one requiring that the Respondent assert its willingness to resort to arbitration. At the hearing, Cahoon emphatically stated that the Respondent was willing to expeditiously arbitrate any complaint allegations that the Board might defer in this case. (Tr. 792–793.) Although the Respondent has declined to allow grievance meetings to occur by phone so that a banned union organizer could participate in that manner, it did indicate a willingness to hold the meetings off the premises with the participation of the banned organizer. Thus, I find that this factor is present.

Under the factors set forth by the Board, I find that it is not appropriate to defer any of the claims at issue in this case. The only claims regarding which a grievance arbitration decision might conceivably be enlightening are the Section 8(a)(5) claims relating to SEIU access to bulletin boards in break rooms at the facility. As discussed above, I find that those claims are not appropriate for arbitration, but even if one assumes that, in isolation, they were deferrable, I would not defer because those claims are highly intertwined with, inter alia, the nondeferrable: 8(a)(1) claims regarding bulletin board access; 8(a)(5) claims regarding access to the bulletin boards; 8(a)(5) and 8(a)(1) claims regarding activities in the cafeteria and other public areas of the facility; and 8(a)(5) and 8(a)(1) claims relat-

[34] Obviously the "no discrimination" provision in the SEIU contract would not reach the access issues, since that provision applies only to an "employee," and Anthony, Scott, Gulley, and Hamilton were not employees at the time the Respondent interfered with their Sec. 7 activities.

ing to the Respondent's decision to ban union representatives based on union activities. The Board declines to defer where the deferrable allegations are inextricably related to non-deferrable allegations. *Windstream Corp.*, 352 NLRB 44, 44 fn.1 (2008), affd. after remand 355 NLRB 406 (2010). Given the overlap, deferral of the dispute regarding Anthony's break room activities would result in the type of inefficient, piece-meal, resolution that the Board has consistently avoided. *Daimler Chrysler Corp.*, 344 NLRB 1324, 1324 fn.1 (2005) (Board disfavors piece-meal deferral of complaint allegations); *Avery Dennison*, 330 NLRB at 390–391 ("Board policy . . . disfavors bifurcation of proceedings that entail related contractual and statutory questions, in view of the inefficiency and overlap that may occur from the consideration of certain issues by an arbitrator and others by the Board.").

B. Interference with Non-Employee Union Organizers Use of the Cafeteria on June 23 and 24

1. Section 8(a)(1)

a. Prohibition on Union Activities in the Cafeteria: The General Counsel alleges that the Respondent interfered with union activities protected by Section 7, and violated Section 8(a)(1): on June 23, 2014, when Cahoon told Anthony and Scott that they were prohibited from discussing union matters in the cafeteria with unit employees and threatened that the Respondent might file an unfair labor practices charge if such discussions continued; and again on June 24, 2014, when the Respondent's security guards surrounded Gulley and Hamilton in the cafeteria to keep them from meeting and talking with employees, when Cahoon told Gulley and Hamilton that they were prohibited from discussing union matters with employees in the cafeteria, and when Cahoon, Wesman and security supervisor Ramacher surveilled Gulley's and Hamilton's conversations with employees in the cafeteria. The Supreme Court and the Board have both recognized that health care facilities have an interest in preventing patients from being disturbed, but have held that a health care facility presumptively violates Section 8(a)(1) by prohibiting union activities in locations that are not immediate patient care areas. *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978); *St. John's Hospital & School of Nursing, Inc.*, 222 NLRB 1150, 1150–1151 (1976), enfd. in part 557 F.2d 1368 (10th Cir. 1997). The employer has the burden of rebutting that presumption by showing that the union activity in a nonpatient care area would cause disturbance or disruption. *NLRB v. Baptist Hospital*, 442 U.S. 773, 781 (1979). In *NLRB v. Babcock & Wilcox*, the Court held that an employer acts unlawfully when it discriminatorily denies union representatives access to its property while permitting others access for similar activities. 351 U.S. 105, 112(1956); see also *BE&K*, 329 NLRB 717, 724 (1999) (same), enfd. 246 F.3d 619 (6th Cir. 2001), judgment reversed on other grounds 536 U.S. 516 (2002); *New Jersey Bell Telephone Co.*, 308 NLRB 277, 281 (1992) ("It has long been established, however, that a denial of access for Section 7 activity may constitute unlawful disparate treatment when a property owner permits similar activity in similar, relevant circumstances."); *Davis Supermarkets, Inc.* 306 NLRB 426, 426–427 (1992) (Supreme Court's decision in *Lechmere* "does not disturb the Court's statement in [*Babcock*] that "an employer may validly post his property . . . if [it] does not discriminate against the union by allowing other distribution.'").

In *Baptist Medical System,* the Board applied these legal standards and found a violation of Section 8(a)(1) in a case that, like the instant one, concerned the lawfulness of a hospital's attempt to stop union representatives from using the facility's public cafeteria for the purpose of engaging in union-related discussions with employees. 288 NLRB 882 (1988), enf. denied 876 F.2d 661 (8th Cir. 1989). The Board explained:

> [T]he Respondent violated Section 8(a)(1) by ordering non employee union organizers . . . to leave its public cafeteria. The Respondent operates the cafeteria for use by the general public as well as by employees for their meals and breaks. At the time they were ejected, [the two non-employee union organizers] were using the cafeteria in a manner consistent with its purpose, meeting with off-duty employees while eating in the restaurant. The Board and the courts have traditionally held that solicitation in restaurants cannot be prohibited when, as in this case, the conduct of the nonemployee union organizers is consistent with the conduct of other patrons of the restaurant. *Dunes Hotel & Country Club*, 284 NLRB 871 (1987); *Harold's Club*, 267 NLRB 1167 (1983), enfd. 758 F.2d 1322 (9th Cir. 1985); *Ameron Automotive*, 265 NLRB 511 (1982); *Montgomery Ward & Co.*, 263 NLRB 233 (1982), enfd. as modified 728 F.2d 389 (6th Cir. 1984); *Montgomery Ward & Co.*, 256 NLRB 800 [(1981)],[35] enfd. 692 F.2d 1115 (7th Cir. 1982); *Marshall Field & Co.*, 98 NLRB 88 (1952), enfd. as modified 200 F.2d 375 (7th Cir. 1952). To hold otherwise would license a property owner to prohibit a union organizer from utilizing its restaurant solely because the organizer was discussing organizational activities. Such a prohibition, which discriminates on the exclusive basis of the union's organization activity, flies in the face of the Supreme Court's admonition against discrimination on this basis when determining the propriety of access restrictions. [citing *Babcock & Wilcox*]. The Respondent could not prevent [the two non-employee union organizers] from using its public restaurant in an orderly way, not disruptive of its business.

Baptist Medical System, supra.

I find that in the instant case, as in *Baptist Medical,* the Respondent violated the Act by discriminating against the union-related conversations that non-employee union representatives Anthony, Gulley, Hamilton and Scott were attempting to have with employees in the facility's public cafeteria on June 23 and 24. The Respondent's cafeteria, like the one in *Baptist Medical*, was in a medical facility, but was open to the general public as well as to employees. The record indicates that at the times in question the union representatives were using the cafeteria in an orderly, non-disruptive, manner. Specifically, the union representatives were sitting at tables conversing with small groups of

[35] In *Montgomery Ward* the Board held that an employer violated Sec. 8(a)(1) by prohibiting union representatives from meeting with employees in its public cafeteria where those representatives were not creating a disturbance and were using the cafeteria in a manner consistent with its purpose.

off-duty employees. They were not carrying signs, using noisemakers or amplification equipment, chanting, or marching. They were not going from table to table to solicit employees or making a general offer of union materials to every employee who passed them. The record does not suggest that union officials attempted to commandeer a section of the cafeteria for their exclusive use by blocking it off or displaying signs or banners that would discourage others from entering the area. Indeed, Cahoon made clear that exactly the same cafeteria gathering that Gulley and Hamilton took part in on June 24 would have been fine with the Respondent as long as it did not involve the discussion of union matters, but rather was confined to a non-union subject such as the Minnesota Twins baseball team. The fact that the Respondent's objection was based solely on the union content of the conversations is further shown by the fact that the Respondent did not take any action to prohibit Scott's activities with employees in the cafeteria and elsewhere prior to discovering that he was a union representative. Indeed, the Respondent's defense that it did not previously condone Scott's union activity is based on the assumption that it was unable to distinguish Scott's union activities from the permitted activities of nonunion visitors until management discovered that he was a union organizer. (See R. Br. 28–30 and 134–135.) Thus, Scott's activities with employees in the cafeteria, and his other union activities at the facility, were not of a type that the Respondent would have prohibited if not for the fact that those activities concerned union matters. I find that nothing distinguished the small, orderly, conversations between union representatives and unit members that the Respondent reacted to with such hostility on June 23 and 24 from other gatherings of cafeteria visitors except for the fact that the Respondent knew that union representatives were present and that union topics would likely be discussed. The Respondent's actions were unlawful not only because they discriminatorily interfered with the union representatives, but because they discriminatorily interfered with employees who, while on break, chose to ask the union representatives about the upcoming picketing event. See *Jensen Enterprises, Inc.*, 339 NLRB 877, 878 (2003) ("[A]n employer violates the Act when employees are forbidden to discuss unionization, but are free to discuss other subjects unrelated to work.").

The conclusion that the Respondent's interference with union discussions in the public cafeteria was discriminatory is buttressed by the fact that the Respondent did not show that it had a written policy or practice that prohibited non-employee visitors from gathering together or with off-duty employees in the cafeteria to discuss any non-union subject. Indeed the Respondent did not show that it had ever prohibited an orderly, non-disruptive, cafeteria gathering of any size where such gathering did not include a union representative. The Respondent nevertheless suggests that the discrimination in this case should be viewed differently than in *Babcock & Wilcox*, supra, *Beth Israel*, supra, and *Baptist Medical System*, supra, because of the Supreme Court's intervening decision in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). In *Lechmere*, the Court ruled that an employer did not violate Section 8(a)(1) by excluding nonemployee organizers from its property during an initial organizing campaign where other reasonable means of access to the employees existed and there was an established policy prohibiting *all* non-employees (including, the Court noted, girl scouts and the salvation army) from engaging in activities on its premises. Ibid. The Respondent's citation to *Lechmere* is not persuasive in the present circumstances for a number of reasons. First, the Court's *Lechmere* holding does not extend to situations, like the instant one, where the unions are not campaigning to represent employees, but rather are the employees' recognized bargaining representatives.[36] See, *Fred Meyer Stores, Inc.*, 359 NLRB No. 34, slip op. at 2 (2012) (*Lechmere* applies to initial union organizing, not where the union is the collective bargaining representative and the contract has an access policy);[37] *CDK Contracting Co.*, 308 NLRB 1117 (1992) (same); *Wolgast Corp.*, 334 NLRB 203 (2001), enfd. 349 F.3d 250 (6th Cir. 2003), cert. denied 541 U.S. 936 (2004) (same). Second, the holdings in *Baptist Medical System*, supra, and *Montgomery & Ward*, supra, both squarely rest on the nondiscrimination rule that the Supreme Court set forth in *Babcock & Wilcox*, supra, and the Board has made clear that that rule continues to apply after *Lechmere*. See *New Jersey Bell Telephone Co.*, 308 NLRB 277, 281 (1992) ("the *Lechmere* decision does not disturb the Court's statement in *Babcock & Wilcox* that an employer acts unlawfully when it discriminates by denying a union access while permitting access to other organizations"); *Davis Supermarkets, Inc.*, 306 NLRB at 426–427 (same).[38] Unlike the employer in *Lechmere*, who showed that its prohibition extended to all non-employees, the evidence here is that the Respondent only prohibited gatherings of the type at-issue here when it knew that union matters were likely being discussed. Therefore, I conclude that the standard described in *Baptist Medical System*, supra, and the cases it relies on such as *Montgomery & Ward*, is controlling. In the instant case the Respondent, in clear violation of the *Babcock & Wilcox* rule, and the holding in *Baptist Medical*, prohibited non-employee

[36] This distinction makes the case for union access even stronger here than in *Baptist Memorial* since the union there was not the representative of employees at the facility, whereas the SEIU and the MNA represented over 1800 employees at the Respondent's facility.

[37] This decision was issued by the 2-member Board that was subsequently invalidated by the Supreme Court in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). Upon de novo review, a validly constituted Board affirmed the holding and rationale of the original decision. 362 NLRB No. 82 (2015).

[38] The Respondent contends that in *Nicks'*, 326 NLRB 997 (1998), the Board held that the *Montgomery & Ward* line of cases was effectively overruled by *Lechmere*. (R. Br. 96–97 fn.106). However, the *Farm Fresh* case relied on by the Respondent was remanded to the Board by the Court of Appeals for the D.C. Circuit and in its post-remand decision the Board explicitly stated that it was *not* holding that *Montgomery & Ward* was overruled by *Lechmere*. *Farm Fresh, Inc.*, 332 NLRB 1424, 1425 (2000). The Respondent cites two other post-*Lechmere* cases in which the Board held that the employer was permitted to enforce a no-solicitation/no-distribution rule to prohibit union activity on or near its property. (R. Br. at 96–97 fn.106), citing *Wal-Mart Stores*, 349 NLRB 1095 (2007), and *Raley's Inc.*, 348 NLRB 382 (2006). In those cases, unlike here, the employer was not the recognized bargaining representative of employees at the facility and the employer was enforcing the restriction in a manner that was not shown to discriminate between union and nonunion activity.

union representatives from engaging in orderly, non-disruptive, gatherings with employees in a public cafeteria that was not an immediate patient care area when union matters were a topic of conversation, but permitted similar gatherings that were not union-related.

As discussed above in the analysis of the request for deferral to arbitration, I also reject the Respondent's contention that the unions, in the relevant collective bargaining agreements, surrendered their Section 7 rights in public areas of the facility. The Respondent has not pointed to any language in those agreements that surrenders the Unions' Section 7 rights, much less any that does so in the clear and unequivocal language required for such a waiver to be effective. *Johnson-Bateman Co.*, 295 NLRB at 184; *Textron Puerto Rico*, 107 NLRB at 587. The SEIU contracts state that, at all reasonable times, the Respondent must provide the SEIU with access to nonpatient nonpublic areas designated by the Respondent, but do not state a single prohibition on SEIU access or suggest that the SEIU is agreeing to surrender any access rights it has under Section 7 of the Act. No reference at all is made to the SEIU's rights in the public areas of the facility, such as the lobby and cafeteria. In the case of the MNA, the contract imposes an obligation on the Respondent to provide multiple bulletin boards at the facility for the use of nurses, but does not state, or suggest, that the MNA has surrendered any of its Section 7 rights at the facility.[39]

For these reasons, I conclude that the Respondent violated Section 8(a)(1) when on June 23, 2014, it prohibited Anthony and Scott from having union-related conversations with employees in the public cafeteria, on June 24, 2014, when it prohibited Gulley and Hamilton from having union-related conversations with employees in the public cafeteria, and on June 24, 2014, when its agents physically interfered with Gulley and Hamilton in the cafeteria in order to prevent them from meeting with, and talking to, employees.

b. Threat to File Unfair Labor Practice Charge: The General Counsel also alleges that the Respondent violated Section 8(a)(1) on June 23, 2013, when Cahoon threatened to file unfair labor practice charges based on Anthony's and Scott's activities in the cafeteria. The Respondent subsequently filed an unfair labor practice charge over the access issue and the Board dismissed that charge. Depending on the circumstances, the Board will sometimes find a violation of Section 8(a)(1) when an employer threatens to file an unfair labor practices charge with the Board in reaction to union-related activity. The Board found a violation in *Flamingo Las Vegas Operating Co.*, 360 NLRB No. 41 (2014), when the employer threatened to file an unfair labor practice charge against an employee who was a union proponent and who had asked other employees how they had voted after the union failed to garner a majority of votes in a representation election. In *Sheller-Globe Corp.*, 296 NLRB 116 (1989), the Board found a violation when an employer threatened to file an unfair labor practice charge against an employee who was also the union president unless that employee would agree to sign off on action "necessary to further [the employer's] illegal plan to eliminate the unit." On the other hand, in *Interstate Food Processing*, 283 NLRB 303 (1987), the Board upheld the finding that an employer did not violate the Act when it reacted to employee complaints that union solicitations were distracting them from their work by asking the union president to investigate the complaints and stating that the employer would file "charges" (understood to mean unfair labor practice charges) if the complaints were true and the conduct continued. The conclusion that no violation had occurred was based, inter alia, on the fact that the employer's statement could reasonably be interpreted to mean that it would file an unfair labor practices charge against the union, not the individual, and that such a statement was not a violation "except, perhaps, under egregious circumstances." The Supreme Court has recognized the necessity of guaranteeing the public coercion-free access to the Board's processes through the charge-filing process. See *NLRB v. Marine & Shipbuilding Workers Local 22*, 391 U.S. 418, 424 (1968) and *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967). In the instant case, the General Counsel alleges that the Respondent violated the Act when it threatened to file an unfair labor practice charge about the access issue, not when it, in fact, filed such a charge. Nevertheless, given the strong public policy in favor of unimpeded access to the Board's processes, I believe that extreme caution is warranted before acting to penalize any party, including an employer, for discussing the possibility of seeking resolution of a labor dispute through the Board's processes.

Given the circumstances present here, I conclude that this is not an egregious case where it is appropriate to find that the employer violated the Act by threatening to avail itself of the Board's processes. I note that Cahoon communicated the alleged threat to *non-employee* union organizers, whereas in the cases relied upon by the General Counsel, the employers communicated the alleged threats to their own employees. See *Flamingo Las Vegas Operating Co.*, supra, *Sheller-Globe Corp.*, supra, and *Postal Service*, 350 NLRB 125 (2007). An employer's expression of disapproval of an individual's union activities is less coercive when that individual is a non-employee since the employer does not possess the same power that it does over an employee's livelihood. Moreover, where, as here, the possibility of unfair labor practice charges is communicated to a non-employee union organizer it is fair (even more so than in *Interstate Food Processing*, supra) to understand the Respondent as threatening to file a charge against the union, not the individual.

For the reasons discussed above, the allegation that the Respondent violated Section 8(a)(1) on June 23, 2014, when it threatened to file an unfair labor practices charge should be dismissed.

c. Surveillance in the Cafeteria: The General Counsel alleges that the Respondent violated Section 8(a)(1) by engaging in surveillance of Gulley and Hamilton on July 24, 2014, in the cafeteria in order to interfere with their ability to meet and talk with employees. Under Board precedent, "management offi-

[39] Since I find that the Respondent's conduct prohibiting SEIU and MNA activities in the cafeteria violated Sec. 8(a)(1) for the reasons discussed above, I do not reach the General Counsel's arguments that the conduct would also have violated Section 8(a)(1) because it was witnessed by unit employees and because the rule regarding access had not been clearly disseminated before it was enforced.

cials may observe public union activity, particularly when such activity occurs on company premises, without violating Section 8(a)(1) of the Act, unless such officials do something out of the ordinary." *Arrow Automotive Industries*, 258 NLRB 860 (1981), enfd. 679 F.2d 875 (4th Cir. 1982) (Table); see also *Durham School Services*, 361 NLRB No. 44, slip op. at 1 (2014) (observation of union activities in a public area was unlawful surveillance when manager "was observing employees in way that was out of the ordinary"). Such "out of the ordinary" surveillance of union activity in public places includes an employer's "unreasonably close" observation of organizers as they finish their lunches. *Montgomery Ward & Co.*, 692 F.2d 1115, 1128 (7th Cir.1982), enfg. 256 NLRB 800 (1981).

The Respondent's observation of Gulley's and Hamilton's conversations with employees in the cafeteria constituted more than ordinary observation of public union activity and clearly rises to the level of unlawful surveillance. Cahoon and the others were not casually observing but rather intentionally and aggressively using surveillance to intimidate employees and chill union conversations. Cahoon began this exchange by telling Gulley, Hamilton, and employees that the union activities they were engaging in were prohibited. When this pressure did not have the desired effect, Cahoon tightened the screws by telling the gathering of union representatives and employees that he was going to sit right next to them. He then proceeded, along with Wesman and Ramacher, to situate himself in close proximity to the union representatives and employees, and to conspicuously monitor their conversation. An employer violates Section 8(a)(1) when a supervisor observes union activity in a public area where, as here, the supervisor's purpose for being at the location is to observe the union activity. *Aero Corp.*, 233 NLRB 401, 405 (1977), enfd. 581 F.2d 511 (5th Cir. 1978). The unusual proximity from which Cahoon and the others observed the union officials' conversations—only a few feet away—significantly heightened the coercive effect of that observation. See *Flexsteel Industries*, 311 NLRB 257 (1993) (employees should be free to participate in union activities without fear that members of management are "peering over their shoulders, taking note of who is involved in union activities, and in what particular ways") and *Montgomery Ward & Co.*, supra. These management activities were out of the ordinary and had the tendency to unreasonably chill the exercise of Section 7 rights. *Fairfax Hospital*, 310 NLRB 299, 310 (1993), enfd. mem. 14 F.3d 594 (4th Cir. 1993), cert. denied 512 U.S. 1205 (1994). It is not at all surprising that when Cahoon and the other company officials began to conspicuously eavesdrop the employees stopped talking and soon left the area.

The conclusion that the Respondent's surveillance violated Section 8(a)(1) is consistent with prior decisions in which the Board found that an employer's observation of public union activity was sufficiently "out of the ordinary" to constitute unlawful surveillance. In *Hoschton Garment Co.*, 279 NLRB 565, 566 (1986), the Board found that the Respondent had engaged in unlawful surveillance at a plant entrance when it "did not merely observe union activity, but rather attempted to prohibit [an employee] from distributing handbills to employees on public property, and that [the supervisor] stood very close to [the employee] for the duration of the handbilling." Similarly, in the instant case Cahoon not only observed the protected union activity, but unilaterally announced a prohibition on that activity before beginning the surveillance. The three Respondent officials situated themselves very close to the activity in an effort to chill employees from speaking to Gulley and Hamilton. In *Sands Hotel & Casino*, 306 NLRB 172 (1992), enfd. 993 F.2d 913 (D.C. Cir. 1993) (Table), the Board found that an employer violated the Act when guards observed public union activity using binoculars. In the instant case, the Respondent's officials also took steps to get an intrusive, close-up, view of union activity in a public area, although they did this not through the use of a mechanical device but through physical proximity. If anything, this physical presence was a more coercive and intimidating intrusion than that represented by the use of binoculars in *Sands Hotel*.

In *Sands Hotel*, it was also noted that there was no evidence that the Respondent's "conduct was based on safety or property concerns." 306 NLRB at 172. Similarly, the Respondent did not show that it had a legitimate basis for the intrusive surveillance in this case. Even assuming that the Respondent was motivated by a good faith, but mistaken, belief that it was addressing violations of a lawful company rule, that would not change the outcome because the Respondent's motivation is not relevant here. The Board has noted that it applies an "objective standard" when deciding whether an employer's conduct "tends to interfere with the free exercise of employee rights," and does not consider the employer's "motivation." See *Miller Electric Pump & Plumbing*, 334 NLRB 824 (2001). In *Days Inn Management Co.*, 306 NLRB 92, 92 fn. 3 (1992), the Board found that the employer had not engaged in unlawful surveillance, but only after noting that the employer: had not disrupted contact between employees and the union; was not able to overhear conversations between employees and the union; and had not attempted to talk to union representatives. In the instant case, those same factors weigh in favor of finding the surveillance unlawful. Cahoon interfered with the conversations that employees were having in the public cafeteria with their union representatives by confronting those representatives and stating that the union activities were prohibited, and then positioning himself where he could overhear any union subjects being discussed.

For the reasons discussed above, I conclude that the Respondent violated Section 8(a)(1) of the Act on June 24, 2014, by coercively surveilling union activities in the cafeteria.

2. Section 8(a)(5) and (1)

The General Counsel alleges that the Respondent's conduct in the cafeteria on June 23 and 24, 2014, in addition to violating Section 8(a)(1), also violated Section 8(a)(5) because that conduct constituted a unilateral change in the established practice regarding nonemployee union representatives' use of the cafeteria for union activities. Where, as here, employees are represented by a union, their employer violates Section 8(a)(5) of the Act by making a unilateral change regarding a mandatory subject of bargaining. *NLRB v. Katz*, 369 U.S. 736, 747 (1962); *Whitesell Corp.*, 357 NLRB 1119, 1171 (2011); *Ivy Steel & Wire, Inc.*, 346 NLRB 404, 419 (2006); *Mercy Hospital of Buf-*

falo, 311 NLRB 869, 873–874 (1993); *Associated Services for the Blind,* 299 NLRB 1150, 1164–1165 (1990); *Bethlehem Steel Co. (Shipbuilding Div.),* 136 NLRB 1500, 1503 (1962).

The Board has held that where an employer unilaterally denies or reduces the union's ability to access unit employees for purposes of representation the unilateral action or change is material in nature. *Turtle Bay Resorts*, 355 NLRB 1272, 1272–1273 (2010); *Frontier Hotel & Casino*, 323 NLRB 815, 817–818 (1997), enfd. in pertinent part 118 F.3d 795 (D.C. Cir. 1997); *Ernst Home Centers, Inc.*, 308 NLRB 848, 848–849 (1992); *American Commercial Lines,* 291 NLRB 1066, 1072 (1988). Under Board precedent, even when an employer accuses a union agent of misconduct, the employer is required to give the union notice and an opportunity to bargain before changing rules regarding the agent's access so that the parties can work together to arrive at a solution to the problem. *Frontier Hotel & Casino*, 323 NLRB at 817. For a change in a mandatory subject of bargaining to trigger the duty to bargain, that change must be "material, substantial, and significant." *Crittenton Hospital*, 342 NLRB 686 (2004); *Bath Iron Works Corp.*, 302 NLRB 898, 901 (1991).

The dispute about whether the Respondent made an unlawful unilateral change in this case when it prohibited nonemployees' union activities in the cafeteria on June 23 and 24 raises two questions: (1) whether there was an established practice regarding nonemployee representatives of the SEIU and the MNA using the cafeteria for union activities, and (2) whether the disputed actions represented a material change from that established practice. Regarding the first of those questions, I begin by noting that none of the relevant labor contracts address the subject of union activities in the facility's cafeteria or other public areas. This does not end the inquiry, however, because the prohibition on unilateral changes to mandatory subjects of bargaining applies to established past practices even if they are not incorporated in a collective-bargaining agreement. *KGTV*, 355 NLRB 1283, 1294 (2010); *Golden State Warriors* 334 NLRB 651, (2001), enfd. 50 Fed.Appx. 3 (D.C. Cir. 2002); *Exxon Shipping Co.*, 291 NLRB 489, 493 (1988). It is the General Counsel's burden to show the existence of such a practice. *National Steel & Shipbuilding*, 348 NLRB 320, 323 (2006), enfd. 256 Fed.Appx. 360 (D.C. Cir. 2007).

In this case, the evidence of past practice is different for the MNA and the SIEU and therefore must be addressed separately. Regarding the MNA, the evidence showed that prior to June 23 the Respondent had treated the activities of nonemployee MNA representatives visiting the cafeteria or other public areas of the facility in the same manner as it treated the activities of other non-employee visitors. How were other nonemployee visitors treated? They were not required to clear security, sign-in, or identify themselves or their affiliation, in order to enter the cafeteria. The Respondent did not monitor their discussions and had not placed restrictions on what they could discuss while visiting the cafeteria. This is exactly how the MNA representatives were treated prior to June 23. MNA representatives Hamilton, McMahon, and Scott all visited the facility and had conversations with others in the cafeteria without ever being interfered with by the Respondent. The Respondent did not show that, prior to June 23, it had ever asserted to the MNA that special restrictions applied to non-employee MNA organizers when they were in public areas of the facility.

This did not change until officials of the Respondent confronted Scott in the cafeteria on June 23 and Hamilton in the cafeteria on June 24. On those dates, the Respondent's officials asked the union representatives to identify themselves and then attempted to prohibit them from sitting with, or talking to, other persons visiting the cafeteria. The record shows that, at the time the Respondent's agents accosted Scott they took the position that non-employee union representatives visiting the facility could not have discussions with employees or about union matters except in the nonpublic locations that the Respondent had designated for such activity. The record indicates that, with respect to the MNA, this location was an office on the lower level of the facility. I conclude that the Respondent's prohibition on MNA activities in public areas of the facility represented a change from the Respondent's established prior practice of allowing non-employee MNA representatives, like members of the public in general, to sit among others in the cafeteria without being required to identify themselves, without being monitored, and without having their conversations limited by subject.

In addition, I find that by banishing the MNA representatives from the public cafeteria where off-duty unit employees congregated, and confining them to a location on the lower level that was not a regular gathering place, the Respondent made a material, substantial and significant change in the ability of union representatives and the employees they represented to access one another at the facility. See, e.g., *Turtle Bay Resorts*, 355 NLRB at 1272–1273; *Frontier Hotel & Casino*, 323 NLRB at 817–818 *Ernst Home Centers, Inc.*, 308 NLRB at 848–849 *American Commercial Lines,* 291 NLRB at 1072. Previously employees could access their union representatives either through casual, impromptu, interactions in the cafeteria, or by arranging to meet those representatives in the more out-of-the way location designated by the Respondent. Many employees would no doubt be less likely to access their representatives in the latter manner for a number of reasons, including because it required some planning and because approaching the location designated by the employer for union activity would render such activity conspicuous. The Respondent did not give the MNA notice or an opportunity to bargain before making this change regarding a mandatory subject of bargaining, but rather presented the prohibition as a fait accompli. Waiver of the right to bargain based on a union's failure to request bargaining will not be found where, as here, the union was not given advance notice of the change and/or where the notice presented the change as a fait accompli. *Eby-Brown Co.*, 328 NLRB 496, 570–571 (1999); *Dorsey Trailers, Inc.*, 327 NLRB 835, 858 (1999), enfd. in part 233 F.3d 831 (4th Cir. 2000); *Jaydon, Inc.*, 273 NLRB 1594, 1601 (1985); *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017–1018 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983).

With respect to access by nonemployee SEIU representatives, the record shows that there was a history of disagreement between the Respondent and the Union about the extent to which nonemployee SEIU representatives could engage in union activities in the cafeteria. Despite, the areas of dispute, the

record shows that prior to June 23 there was no dispute that nonemployee SEIU representatives were permitted, at a minimum, to engage in conversations in the cafeteria that did not rise to the level of conducting a "meeting." In communications with the SEIU, the Respondent took the position that nonemployee SEIU representatives could have conversations about union matters in the cafeteria with one or two other individuals at a time. Moreover, prior to June 23, human resources officials observed such conversations and took no action to prevent them. To the contrary, Cahoon himself sometimes used such occasions as an opportunity to engage the SEIU representative in union-related conversations. Based on the evidence, I find that the Respondent had an established practice of permitting nonemployee union representatives to talk about union matters with one or two other individuals in the cafeteria at a time.

On June 23 and 24, the Respondent attempted to prohibit SEIU representatives Anthony and Gulley from having union-related discussions with employees in the cafeteria. In neither of instances was either representative talking to more than one or two individuals at a time about union business. On June 23, when Cahoon told Anthony that he was engaging in unlawful union activity in the cafeteria, Anthony was sitting at a table and talking with a single off-duty SEIU steward, Harold Evenson. A third individual, Scott was at the table, but he was not talking with anyone or participating in the conversation between Anthony and Evenson. There were also persons at nearby tables and while the record suggests that Anthony had previously responded to questions from some of those persons, he was not addressing, or being addressed by, them at the time he was speaking with Evenson. Regarding the subsequent June 24 incident in the cafeteria, the evidence showed that the Respondent's security guard/agents attempted to block Gulley from even proceeding into the cafeteria—at which juncture it was not possible to know whether he would address more than two other individuals at the same time. Gulley managed to maneuver around the security guards and, although he had not arranged to meet anyone, he approached employees who were on break at one of the cafeteria tables and asked to sit down. There were between three and seven employees sitting in proximity to one another, but the record does not show that they were all part of a single group or conversation. At any rate, neither Gulley nor Hamilton attempted to address the nearby employees collectively about union business. After Gulley sat, one of the employees present asked him a question. It was at that point that Cahoon, Wesman, and Ramacher, confronted Gulley, and stated that he was improperly conducting union business in the cafeteria. Then the Respondent's officials engaged in conspicuous and unlawful surveillance with the purpose and effect of interfering with union-related communications.

I find that on June 23 and 24, at around the time of the informational picketing, the Respondent unilaterally changed the existing practice regarding SEIU activities in the cafeteria. The Respondent had an established practice of permitting nonemployee SEIU representatives to discuss union matters in the cafeteria in groups of up to, at least, two and three at a time. Beginning on June 23, it prohibited such conversations even when only two or three individuals were conversing. Although on June 23 and 24, there were other individuals seated at nearby tables or otherwise in proximity to the cafeteria conversations, the Respondent's prior communications to the SEIU had not required that a representative who was having an otherwise permissible conversation in the cafeteria maintain a certain distance from nonparticipating individuals. It is hard to see how a union representative could comply with such an additional requirement since, as Cahoon's surveillance makes clear, in a public cafeteria one cannot control who sits near to him or her. An off-duty unit employee's permitted conversation with his or her nonemployee SEIU representative could, at any point, become a violation of the Respondent's new rule simply because other individuals sat down nearby or subsequently addressed the union representative with their own questions. For this reason, as well as for the reasons discussed regarding the MNA, the Respondent's unilateral change to the SEIU's ability to access employees in the cafeteria for representational purposes was material, substantial and significant. *Turtle Bay Resorts*, supra; *Frontier Hotel & Casino*, supra; *Ernst Home Centers, Inc.*, supra; *American Commercial Lines,* supra. The Respondent made this material, substantial and significant change to a mandatory subject of bargaining without giving the SEIU notice or an opportunity to bargain.

The Respondent denies that it changed any established practice regarding union access to unit employees in the cafeteria, but argues that even if it did so, any such changes did not trigger a bargaining obligation because they were not material, substantial and significant. I have considered that argument but, as alluded to above, find that it is not persuasive. Board precedent indicates that any change that actually reduces the union's access to represented employees is a material, substantial, and significant change for purposes of Section 8(a)(5). See, e.g., *Frontier Hotel*, supra ("Any change that actually interferes with contractually agreed employee access to the unit collective-bargaining representatives for representational purposes is a material change."), citing *Ernst Home Centers*, supra. The reason that the Board did not find an obligation to bargain in the cases relied on by the Respondent—*Selkirk Metalbestos*, 321 NLRB 44 (1996) and *Peerless Food Products*, 236 NLRB 161 (1978—was that in each of those instances the Board determined that the employer had not made a change that in any way reduced the union's access to represented employees. In *Selkirk*, the Board stated that it did not find a violation because "the record fails to show any factual basis to support a finding that the Union's access to employees was less restrictive or more confidential before the change" than it was after the change. 321 NLRB at 44 fn. 2.[40] Indeed, in *Frontier Hotel*, the

[40] In *Selkirk*, the established practice was that a union representative could discuss grievances with involved employees by announcing himself at the reception desk and then being escorted to the lunchroom by a plant manager. The allegedly material change in that case occurred when the plant manager escorted the union representative to a conference room, rather than the lunchroom, to meet with the involved employees. Unlike in the instant case, it had not been the practice in *Selkirk* for union representatives to enter the facility without notice to the employer and have impromptu, casual, interactions with employees in the lunchroom. Thus the change in *Selkirk* was only a matter of the specific room that the plant manager provided for a pre-arranged meet-

Board clarified that in *Peerless* "the Board found no violation because it found no evidence that the employer actually had applied, or intended to apply, the rule so as to reduce the access of union representatives to employees for any representational purpose." 323 NLRB at 818. The circumstances of the present stand in stark contrast to those in *Selkirk* and *Peerless* because here the Respondent specifically aimed its new rule at union representatives and reduced the ability of union representatives and represented employees to access each other at the facility through impromptu, informal, interactions. Where that is the case, the Board, has distinguished *Peerless* and found a violation of Section 8(a)(5). *Frontier Hotel*, supra (Board distinguishes *Peerless* and finds a violation because "[i]n the present case . . . the Respondent's new restriction was specifically aimed at union representatives and it actually resulted in denying employee access to the representatives on the day the restriction was imposed."). I find that given the facts here, and the applicable precedent, *Selkirk* and *Peerless* are not controlling and that a violation has been shown.

For the reasons discussed above, I find that, on June 23 and 24, 2014, the Respondent made unilateral changes in violation of Section 8(a)(5) and (1) when it imposed new restrictions on discussions in the public cafeteria between unit employees and nonemployee representatives of the MNA and the SEIU.

C. Interference with Union Access to Bulletin Boards

The General Counsel also alleges that the Respondent violated Section 8(a)(1) and Section 8(a)(5) and (1) on February 10, 2014, and June 23, 2014, when it interfered with nonemployee union representatives' access to employee break rooms on patient care units.

Section 8(a)(1)

On June 23, 2014, the Respondent prohibited nonemployee union representatives Anthony and Scott from accessing locked employee break rooms on patient care units. Anthony and Scott were attempting to access these rooms in order to post union information on bulletin boards and have brief interactions with off-duty unit employees, and the General Counsel alleges that the Respondent's denial of such access interfered with Section 7 activity in violation of Section 8(a)(1) of the Act. After considering the evidence and arguments submitted by the parties, I find that the Respondent did not violate Section 8(a)(1) by prohibiting nonemployee union representatives from accessing these locked employee break rooms. As discussed above, in the *Baptist Medical* and *Montgomery Ward & Co.* cases, the Board found that employers violated Section 8(a)(1) when they prohibited nonemployee union representatives from using areas on their property for union-related activities where those areas were open to the general public and the representatives were using the areas in a manner consistent with usage by other nonemployee visitors. The break rooms at issue here, however, were not areas open to the public, but rather locked rooms on patient care units. Nonemployees who wished to enter these rooms would have to pass by a nursing station, walk down a hallway lined with patient rooms, and persuade a staff member to unlock the break room door using a code that was distributed to hospital staff. There was no evidence that the Respondent permitted members of the general public to use these employee break rooms and the fact that the rooms were kept locked strongly suggests that it did not permit such usage. I find that the General Counsel has not shown that the Respondent was discriminatorily denying access to the nonemployee union representatives in a manner inconsistent with its treatment of other nonemployee visitors to the hospital, and therefore find that a violation is not shown under *NLRB v. Babcock & Wilcox*, supra, and *Baptist Medical* and *Montgomery Ward & Co.* Absent such circumstances, and where, as here, the union has other reasonable means of accessing employees and has not secured a contractual right to the additional access sought, it is appropriate to revert to the general rule under which employers may exclude nonemployee union organizers from nonpublic areas on company property. *Babcock & Wilcox*, 351 U.S. at 112–113; *North Hills Office Services*, 345 NLRB 1262–1263, 1262 (2005). The General Counsel cites no cases showing that, where other reasonable means of reaching employees exist, an employer cannot restrict a nonemployee union representative's access to nonpublic areas of a hospital in the absence of a prior agreement between the parties, an established practice, or evidence of discrimination.

In reaching this conclusion, I considered Board decisions holding that employee break rooms, even those that are on patient care units and in proximity to immediate patient care areas, are not immediate patient care areas for purposes of *Beth Israel Hospital,* supra, and *Baptist Hospital*, and therefore that an employer presumptively violates Section 8(a)(1) by prohibiting union activity in such areas. *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 203, and 209 (2007), enfd. 519 F.3d 373 (7th Cir. 2008); *Baptist Medical Center/Health Midwest*, 338 NLRB 346, 349 and 376 fn. 37 (2002). However, while the Respondent cannot lawfully prohibit off-duty employees from engaging in union activities in their break rooms, it can prohibit unauthorized members of the public from entering these or other restricted areas of the hospital. See *North Hill Office Services*, supra. [41] The analysis would be different if the record showed that the Respondent was discriminating between nonemployee union representatives and

ing with a designated individual. The change that the Respondent made here was not simply one of location, but one that largely eliminated the established practice allowing union representatives and represented employees to have impromptu, casual, interactions in the public cafeteria where off-duty employees congregated. Moreover, the Respondent's new rule did not merely change the location of access from one room to another, but reduced the number of locations since the representatives and employees had previously had the option of meeting *either* in the cafeteria *or* in the nonpublic areas designated by the Respondent, and now were being limited to only the designated nonpublic areas.

[41] I am not persuaded by the General Counsel's contention that the denial of access violated Section 8(a)(1) because the Respondent ejected Anthony and Scott from the break room in the presence of a unit employee. The fact that an employee is present does not preclude an employer from removing unauthorized non-employees from restricted areas on company property. See *North Hills Office Services*, supra, and *Chemtronics Inc.*, 236 NLRB 178 (1978).

other members of the public, but, as noted above, that was not shown with respect to the break rooms. Cf. *Babcock & Wilcox*, supra (employer acts unlawfully when it discriminatorily denies union representatives access to its property while permitting others access for similar activities).

Regarding, the prior, February 10, 2014, incident in which the Respondent denied Anthony access to the bulletin board on the cardiac intensive care unit known as 4 SW, the General Counsel has also failed to show a violation. In that case not only was the bulletin board in a locked break room on a patient care unit, but it was situated in such a way that it could only be reached after passing through the nurse's station—an area that members of the public did not have to enter in order to visit patient rooms.

For the reasons discussed above, I conclude that the evidence does not show that the Respondent violated Section 8(a)(1) on February 10, 2014, or June 23, 2014, when it denied nonemployee union representatives access to a locked employee break room on patient care units at the facility.

1. Section 8(a)(5) and (1)

The General Counsel also alleges that the Respondent made an unlawful unilateral change when it prohibited Anthony and Scott from accessing a locked employee break room on June 23, 2014, and when it prohibited Anthony from accessing the bulletin board in a locked employee break room in the 4 SW patient care unit on February 10, 2014. Where employees are represented by a union, their employer violates Section 8(a)(5) and (1) of the Act by making a unilateral change regarding a mandatory subject of bargaining. *NLRB v. Katz*, supra; *Whitesell Corp.*, supra; *Ivy Steel & Wire, Inc.*, supra; *Mercy Hospital of Buffalo*, supra; *Associated Services for the Blind*, supra; *Bethlehem Steel Co. (Shipbuilding Div.)*, supra. The question here is whether the prohibition on access to the locked employee break rooms by nonemployee union representatives constituted a change. For the reasons discussed below, I find that it did not.

As noted above, the relevant collective bargaining agreements do not give the SEIU or the MNA the right to access bulletin boards in locked employee break rooms on patient care units. The SEIU contracts state that union representatives will have access to bulletin boards, but do not state that union representatives will have access to *every* bulletin board at the facility. Nor do they state, either specifically or in general terms, that SEIU representatives will have access to the bulletin boards in the locked employee break rooms on patient care units at the facility. As far as the collective bargaining agreement between the Respondent and the MNA goes, the relevant language there states that the Respondent will provide bulletin board spaces accessible to nurses for the purpose of posting meeting notices and related materials. This language, like that in the SEIU contracts, does not state that every bulletin board at the facility will be accessible for such activities or that the bulletin boards in locked employee break rooms are among those that must be accessible. Indeed, the MNA language does not address access by nonemployee union representatives at all. As discussed above, during bargaining the Respondent and the SEIU have both proposed changes to the contract provision on access to bulletin boards—the Respondent offering language that would create additional restrictions that are not in the current contracts and the SEIU offering language that would create additional union rights to access that are not stated in the current contracts. Neither side has obtained the other side's agreement to these proposals regarding access to bulletin boards.

Even though the applicable collective bargaining agreements do not provide that nonemployee union representatives of the SEIU and the MNA will have access to the locked employee break rooms on patient care units, the Respondent's prohibition would still constitute a change if there was an established past practice allowing such access. *KGTV, Inc.*, supra; *Golden State Warriors*, supra; *Exxon Shipping Co.*, supra. In this case, the General Counsel has failed to prove the existence of such a practice. It is true that non-employee representatives for the MNA and the SEIU had a history of accessing the locked employee break rooms on patient care units for the purpose of posting union information and having brief interactions with off-duty employees. However, the record also shows that those nonemployee union representatives were doing this without the knowledge of the responsible officials in the Respondent's labor relations department—Cahoon and Wesman. The evidence showed that Cahoon and Wesman had never authorized nonemployee union representatives to access the employee break rooms, and did not show that any other official in the labor relations department had authorized such access. To the contrary, although the Respondent had not specifically discussed access to the employee break rooms on patient care units with Anthony, Wesman had informed Anthony of the Respondent's position that Anthony was prohibited from entering patient care floors *at all*. In addition, there was no evidence that the Unions or the Respondent's staff had ever informed the labor relations department that nonemployee union representatives were accessing the employee break rooms on patient care floors. As discussed above in my findings of fact, I credit the testimony of the Respondent's labor relations officials that they were unaware that this was going on prior to the incidents giving rise to the alleged violations.[42] The Board has declined to find that an employer unilaterally changed a past practice where, as here, the employer was unaware of the supposed past practice. *Regency Heritage Nursing & Rehabilitation Center*, 353 NLRB 1027–1028 (2009);[43] *BASF Wyandotte Corp.*, 278 NLRB 173, 180 (1986).

There was testimony that in at least some instances the persons who previously granted the nonemployee union representatives access to the locked break rooms were nurse managers or health unit coordinators. However, SEIU officials Bialke and

[42] This is different from the situation regarding the cafeteria, since Cahoon had not only seen nonemployee union representatives in the cafeteria on numerous occasions, but had initiated conversations about union business when he found such a representative in the cafeteria.

[43] This decision was issued by a two-member Board that was later found to be invalidly constituted. See *New Process Steel v. NLRB*, 560 U.S. 674 (2010). A validly constituted three-member Board subsequently affirmed the two-member Board in *Regency Heritage Nursing & Rehabilitation Center*, 355 NLRB 603 (2010), enfd. 437 Fed.Appx. 65 (3d Cir. 2011).

Anthony both testified that it was understood that Cahoon and Wesman of the labor relations department were the company officials who dealt with questions about SEIU access at the facility. Moreover, the General Counsel did not elicit testimony from a single nurse manager or health unit coordinator who had unlocked a break room for one of the nonemployee union organizers. Thus one can only guess at the basis upon which such individuals believed they were acting when they took that action. Finally, while the evidence showed that nurse managers and health unit coordinators had unlocked employee break rooms for nonemployee union representatives, it did not show that they (as opposed to unit employees) had done so with any frequency or that they had done so with sufficient frequency that their actions could conceivably have amounted to an established past practice.

I find that the evidence fails to show that the Respondent made an unlawful unilateral change on either February 10, 2014 or June 23, 2014, when it acted to prohibit nonemployee union representatives from accessing the locked employee break rooms on patient care units at the facility. The complaint allegation that such actions violated Section 8(a)(5) and (1) should be dismissed.

D. Respondent's Decision to Eject Anthony and Scott and Impose a 1-Year Ban.

On June 23, 2014, after Cahoon interrupted Anthony's and Scott's union activities in the cafeteria and employee break room, the Respondent ejected Anthony and Scott from the facility and banned them from re-entering for a period of 1 year. The complaint alleges that these actions by the Respondent violated Section 8(a)(1) and Section 8(a)(5) and (1) of the Act.

Cahoon testified that the decision to ban Anthony and Scott was based on the "activity we saw . . . in the cafeteria, and the fact that they were up on a patient care unit." There was no contrary testimony or other evidence showing that the Respondent would have removed and banned Anthony and Scott based solely on their presence on a patient care unit and without regard to the activity in the cafeteria. In *Frontier Hotel & Casino*, the Board held that an employer violates the Act by denying union representatives access to its facility because of their failure to comply with an unlawfully imposed rule. 323 NLRB at 818. Under that precedent, the Respondent acted unlawfully when it prohibited Anthony's and Scott's union activities in the cafeteria and therefore the Respondent acted unlawfully by denying them access to its facility for failing to comply with that unlawful prohibition. Ibid.; see also *Double Eagle Hotel & Casino*, 341 NLRB 112, 112 fn. 3 (2004) (employee discipline that is based on an invalid no access rule is itself unlawful), enfd. 414 F.3d 1249 (10th Cir. 2005), cert. denied 546 U.S. 1170 (2006); *Flambeau Airmold Corp.*, 334 NLRB 165, 167 (2001) (when an unlawfully implemented work rule is a factor in employee discipline, that discipline itself violates Section 8(a)(5) of the Act). Since the removal and ban also interfered with the ability of unit employees and their chosen representatives to communicate about union matters, the conduct also interfered with Section 7 rights in violation of Section 8(a)(1).

The Respondent's decision to remove Anthony and Scott from the facility for 1 year would be a violation of Section 8(a)(5) and (1) even if the cafeteria prohibition on which it was based was not itself unlawful. The Board has held that an employer violates Section 8(a)(5) by refusing to allow a nonemployee to access its facility to perform his or her duties as a union representative. *The Modern Honolulu*, 361 NLRB No. 24, slip op. at 2 (2014); *Neilmed Products, Inc.*, 358 NLRB 47, 47 fn. 2 (2012); *Claremont Resort & Spa*, 344 NLRB 832, 832 and 835 (2005); see also *Fitzsimons Mfg. Co.*, 251 NLRB 375, 379 (1980) ("It is well established that each party to a collective-bargaining agreement has both the right to select its representative for bargaining and negotiations and the duty to deal with the chosen representative of the other party."), enfd. sub nom. *Auto Workers v. NLRB*, 670 F.2d 663 (6th Cir. 1982). An employer can justify such action only if "there is 'persuasive evidence that the presence of the particular individual would create ill will and make good-faith bargaining impossible.'" *Neilmed Products*, supra, quoting *KDEN Broadcasting Co.*, 225 NLRB 25, 35 (1976). Under this standard, the Board has held that union representatives could not be denied access to an employee's premises even after engaging in misconduct that was rather serious. For example, in *Neilmed Products*, the Board found a violation where the employer denied access to a union representative who had yelled angry comments at employees crossing a picket line and had broken the windshield of a passing car. In *Claremont Resort & Spa*, supra, the Board found that an employer could not refuse to deal with a union representative even after that representative had attempted to physically force her way into a meeting between an employee and a manager. 344 NLRB at 832 fn. 2. In *Victoria Packing Corp.*, the employer was found to have acted unlawfully by refusing further access to a union representative who yelled "I'm going to get you and your . . . company" at the company's owner after being told that he could not talk to employees during worktime. 332 NLRB 559, 599–600 (2000). In another case, *Long Island Jewish Medical Center*, an employer violated the Act by banning a union representative from its facility after the representative cursed at managers and lightly shoved one of them. 296 NLRB 51, 70–72 (1989). The Board has withheld its approval for employer action banning union representatives from its premises except in cases involving egregious representative misconduct. See, e.g., *Sahara Datsun*, 278 NLRB 1044, 1046–1047 (1986) (employer could lawfully refuse to deal with union representative who had contacted the employer's bank with unsupported allegations of financial impropriety by employer's managers), enfd. 811 F.2d 1317 (9th Cir. 1987); *Fitzsimons Mfg. Co.*, 251 NLRB at 379–380 (employer could lawfully exclude union representative who engaged in an unprovoked physical attack on company's personnel director).

In this case, the Respondent banned Anthony and Scott for conduct that was in no way violent or disruptive and which was, in significant part, within their rights under the Act. Anthony's and Scott's conduct did not begin to approach the types of egregious misconduct present in those unusual cases where the Board found that an employer could lawfully ban the employees' chosen representative from its facility. Moreover, the Respondent banned MNA representative Scott without previously informing him or the MNA that union activities in the

cafeteria or employee break rooms were frowned upon by the Respondent, much less that the Respondent considered them so egregious as to warrant banning him from the facility. In Anthony's case, the record does reveal a history of friction regarding the limits of his right to access the facility to represent SEIU members. Nevertheless, Anthony was not shown to have ever behaved in a disruptive or threatening manner, and certainly not to have engaged in unprovoked physical violence or other egregious misconduct of the sort that the Board has found can justify banning a union representative from the employer's facility. What Anthony did was hold, in a polite if persistent manner, to the SEIU's view regarding its Section 7 rights at the facility, rather than acquiesce to the employer's more restrictive (and with respect to the cafeteria, incorrect) view. Under the applicable standards, Anthony's conduct does not come close to justifying the Respondent's decision to prohibit him from entering the facility to provide representation to bargaining unit employees.[44]

The Respondent violated Section 8(a)(1) and 8(a)(5) and (1) on June 23, 2014, when it ejected Anthony and Scott from its facility and banned them from returning for a period of 1 year.

E. Allegations Regarding Respondent's Prohibition on Anderson's Posting Information about Picketing on Bulletin Board in His Work Area

The General Counsel alleges that, on June 23, 2014, the Respondent violated Section 8(a)(1) and 8(a)(5) and (1) when Gubbins told Anderson that he was prohibited from posting union information on the bulletin board located in the unit where he worked. The evidence showed that Anderson, a union steward for 7 years who was also on the SEIU bargaining committee and executive board, had placed a flyer regarding the imminent picketing activity on a bulletin board in the SPD department where he worked. The SPD department was not a patient care area of the facility, but rather one where medical implements were sterilized and prepared for distribution. It is clear that the bulletin board was not in an area that employees were prohibited from entering because the employer and others routinely posted information for employees on it. For example, the Respondent posted information there for employees regarding its bargaining proposals. Anderson had posted information regarding SEIU activities on the bulletin board in the past and Gubbins was aware that the information was there. On June 23, the day before the informational picketing, Wesman told Gubbins that the SEIU was not permitted to post on the bulletin board. Gubbins, in turn, informed Anderson that he could not place SEIU information on the bulletin board and also removed the information that Anderson had posted and returned it to him. She told Anderson, however, that it would be permissible for Anderson to post other information such as flyers about a promotion providing hospital employees with free admission to a zoo. The next day, Wesman confronted Anderson, asked him if he had posted the union flyer that Gubbins found on the SPD bulletin board and, after Anderson said that he had posted it, Wesman told him that doing so was prohibited. Anderson informed Wesman that even before Anderson became a steward approximately 7 years earlier, it was the SEIU's practice to post information on that bulletin board. Wesman accused Anderson of violating the contract by posting there and said that Anderson's position meant that "I can go ahead and break the contract . . . as long as nobody knows about it."

1. Section 8(a)(1)

The General Counsel alleges that the Respondent violated Section 8(a)(1) by prohibiting employee Anderson from posting union information on a bulletin board that was used to communicate with employees and that was in the area where Anderson was assigned to work. That location was not an immediate patient care area. Therefore, under the Supreme Court's decision in *Beth Israel Hospital*, supra, the prohibition on the display of union information there is presumptively unlawful. The employer has not rebutted that presumption by showing that the posting caused a disruption of patient care or a disturbance to patients. *Baptist Hospital v. NLRB*, 442 U.S. at 781 (the employer has the burden of showing that union activity in a non-patient-care areas would cause disturbance or disruption). Moreover, in this case unlawful discrimination is shown since the Respondent prohibited the union posting while stating that it was permissible to post information about nonunion activities such as a promotion involving free admission to a zoo. *Honeywell, Inc.*, 262 NLRB 1402 (1982), enfd. 722 F.2d 405 (8th Cir. 1983) (in case involving a bulletin board, the Board finds a violation because the employer prohibited union posting while permitting other types of postings by employees); *Container Corp. of America*, 244 NLRB 318, 318 fn. 2 (1979), enfd. in part 649 F.2d 1213 (6th Cir. 1981) (same).

I find that the Respondent violated Section 8(a)(1) on June 23, 2014, when it prohibited Anderson from posting union information on the bulletin board in the department where he worked.

Section 8(a)(5) and (1)

The General Counsel alleges that when Gubbins prohibited Anderson from posting SEIU information on the bulletin board in the SPD department the Respondent not only violated Section 8(a)(1), but also made a unilateral change in violation of Section 8(a)(5) and (1) of the Act. Based on my review of the record, I find that the General Counsel has failed to demonstrate that there was an agreement or established practice regarding employee posting at that location. As discussed with respect to the other allegations regarding posting discussed above, the labor contracts between the Respondent and the

[44] In its brief, the Respondent contends that its decision to remove and ban the two union representatives from the facility did not violate Sec. 8(a)(5) because the Unions never sought to bargain over those decisions. In the circumstances present here, an 8(a)(5) violation is shown because the punishment was imposed pursuant to a rule that was adopted in violation of Sec. 8(a)(5) and because the punishment interfered with employees' right to choose their own representative, regardless of whether there was a refusal to bargain over the specific punishment imposed. Even if such a showing was required, I would find a violation since the Respondent presented its decision as a *fait accompli* without giving the Unions advance notice an opportunity to bargain. See *Eby-Brown Co.*, supra; *Dorsey Trailers*, supra; *Jaydon, Inc.*, supra; *Ciba-Geigy Pharmaceuticals Division*, supra. Immediately upon confronting Anthony and Scott in the break room, the Respondent's officials announced that the two union representatives were being banned from the facility and that police were being called.

SEIU do not provide that the SEIU has the right to post on all bulletin boards at the facility or that it has the right to access specific bulletin boards of the SEIU's choosing, such as the one in the SPD department. Moreover, although I find that Gubbins, the SPD manager, had permitted the SEIU to post information on the bulletin board for a period of time, this was done without the knowledge of the officials in the labor relations department with whom the SEIU dealt about such matters. Under all the circumstances present here, I conclude that the evidence fails to demonstrate the existence of an established past practice permitting the SEIU to post on the SPD bulletin board, and therefore fails to establish that a unilateral change occurred when Gubbins prohibited Anderson from continuing to make such posts. The SEIU has the right to post there, but that right is conferred by Section 7 and 8(a)(1) of the Act, not the labor contracts or an established practice.

The allegation that the Respondent made a unilateral change in violation of Section 8(a)(5) and (1) when it prohibited Anderson from posting SEIU information on the bulletin board in the SPD department should be dismissed.

F. Allegation that Wesman Unlawfully Interrogated and Threatened Anderson on June 24

The General Counsel alleges that Wesman, during the June 24 interaction that he initiated with Anderson, violated Section 8(a)(1) by coercively interrogating Anderson and threatening surveillance. I find that these allegations are established.

An interrogation is unlawful if, in light of the totality of the circumstances, it reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Mathews Readymix, Inc.*, 324 NLRB 1005, 1007 (1997), enfd. in part 165 F.3d 74 (D.C. Cir. 1999); *Emery Worldwide*, 309 NLRB 185, 186 (1992); *Liquitane Corp.*, 298 NLRB 292, 292–293 (1990). Relevant factors include: whether the interrogated employee was an open or active union supporter, whether proper assurances were given concerning the questioning, the background and timing of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of the interrogation. *Stoody Co.*, 320 NLRB 18, 18-19 (1995); *Rossmore House Hotel*, 269 NLRB 1176, 1177–1178 (1984), affd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Based on my consideration of the record as a whole, I conclude that a violation is shown under the Board's standard. Wesman was not Anderson's immediate supervisor, but rather an upper level official in the labor relations department with facility-wide authority. This fact would tend to add to the coercive impact of the questioning. At the time that Wesman confronted Anderson with questions about his protected posting activity, the matter had already been addressed between Anderson and his immediate supervisor, Gubbins, pursuant to Wesman's instruction. Thus the subsequent questioning by Wesman seemed to have little if any purpose other than to make Anderson uncomfortable about the posting activity that the Respondent already knew he had engaged in. Wesman intensified the intimidation by referencing the Respondent's decision, one day earlier, to punish Anthony with a 1-year ban for, inter alia, posting union information on a bulletin board. This would reasonably suggest to Anderson that the Respondent might punish him for the posting activity that Wesman was questioning him about. The level of coercion was further heightened when Wesman challenged Anderson's account of his posting activity by mentioning what he said he had watched Anderson doing and by confronting him with statements that Wesman said Anthony had made regarding that activity.

Wesman failed to mitigate the coercive tenor of the interrogation by assuring Anderson that he could answer without fear of reprisal. To the contrary, by referencing the punishment meted out to Anthony just one day earlier for related activity, Wesman gave just the opposite impression. It is not surprising that, by the end of the interrogation, Anderson felt it was necessary to tell Wesman that the intimidation had been successful and that he was going to quit his union activities. See, e.g., *Wilshire Plaza Hotel*, 353 NLRB 304, 318 (2008) (fact that union supporter reacts to interrogation by refraining from future union activity is "best indication that [the] interrogation had been coercive and had achieved the desired result").

In reaching the conclusion that the interrogation was unlawfully coercive, I considered the fact that Anderson was an open union supporter. Anderson's willingness to openly engage in certain union activities would weigh on the side of finding that questioning him about those open activities was not coercive. In this case, however, Wesman did not limit himself to questioning about things Anderson had chosen to engage in openly. Rather Wesman used assertions about what the Respondent purportedly knew from surveillance, and from interviewing Anthony, to contradict Anderson and pressure him to admit to activities that Anderson had either chosen not to reveal or had not actually engaged in.

Based on the totality of the circumstances, I conclude that Wesman's questioning had a reasonable tendency to interfere with, restrain, or coerce Anderson's union activities, and also served as a warning to Anderson that his union activities were under surveillance. *Robert F. Kennedy Medical Center*, 332 NLRB 1536, 1539–1540 (2000) ("When an employer creates the impression among its employees that it is watching or spying on their union activities, employees' future union activities, their future exercise of Section 7 rights, tend to be inhibited."); see also *Flexsteel Industries*, 311 NLRB at 257 (employee should be free to participate in union activities "without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways.").

I find that the Respondent violated Section 8(a)(1) on June 24, 2014, when Wesman coercively interrogated Anderson about his union activities and indicated that such activities were under surveillance.

G. Prohibition on Wearing Union Shirts inside Facility

The General Counsel alleges that the Respondent violated Section 8(a)(1) on June 24, 2014, when Abrams (vice-president of human resources) directed Geurts (off-duty employee) to stop displaying his union shirt in the facility's public atrium area and when a nurse manager and security guards told union representatives Gulley and Hamilton that they could not display their union shirts in the facility's public lobby. The Supreme

Court and the Board have both recognized that hospitals have a legitimate interest in providing a tranquil atmosphere for their patients. To that end, such employers have been granted leeway to restrict the display of union insignias in immediate patient care areas. *Beth Israel Hospital v. NLRB*, 437 U.S. at 507; *NLRB v. Baptist Hospital, Inc.*, 442 U.S. at 779–781; *St. John's Hospital & School of Nursing, Inc.*, 222 NLRB at 1150. However, the same leeway does not exist regarding locations that are not immediate patient care areas. In those areas, a medical facility presumptively violates the Act by prohibiting individuals from wearing union insignia. *NLRB v. Baptist Hospital*, 442 U.S. at 781; *Healthbridge Management LLC*, 360 NLRB No. 118, slip op. 1–2 (2014), enfd. 2015 WL 4909945 (D.C. Cir. 2015). An employer may rebut that presumption by showing special circumstances – in particular that the display of union insignias is disrupting health care operations or disturbing patients. *Baptist Hospital*, 442 U.S. at 781; *Beth Israel Hospital*, 437 U.S. at 507.

The Respondent has not presented any evidence that rebuts the presumption that it violated Section 8(a)(1) by interfering with Geurts', Gulley's, and Hamilton's right to display union insignias in a location at the hospital that was not an immediate patient care area. There was no evidence showing that by wearing union shirts in the lobby of the facility these individuals were in any way disrupting health care operations or disturbing patients. The shirts had union insignias on them, but no picketing slogans or criticisms of the Respondent. Rather than point to any evidence of a disturbance or disruption, the Respondent notes that the union shirts at issue were the same as those that were being worn by the persons participating in the informational picketing in a park near the hospital's campus. The Respondent does not explain if, or how, those circumstances caused the wearing of union shirts in the facility's public lobby and atrium to become disruptive to patient care or disturbing to patients. During their time inside the facility Geurts, Gulley and Hamilton were not chanting, carrying signs, using noisemakers or amplification devices, accosting other visitors, parading in large groups, or otherwise engaging in conduct that might arguably be disruptive or disturbing to persons at the facility for treatment. If anything, it was the Respondent who risked causing a disturbance by confronting these individuals about their union shirts. Even Wicklander, the Respondent's president, conceded that, given that Geurts did not have a shirt on underneath his union shirt, it caused a disturbance to have him remove the union shirt in the facility's public atrium. Under the circumstances, and although antiunion motive is not necessary to show a violation of Section 8(a)(1) in this context,[45] the record suggests that management was motivated in this instance by hostility towards the union activity, not by sincere concerns about maintaining a tranquil atmosphere for patients.

I find that the Respondent violated Section 8(a)(1) on June 24, 2014, by prohibiting an off-duty employee and two nonemployee union representatives from wearing shirts with union insignias in the public lobby and atrium of the facility.

H. Allegation that the Respondent Discriminatorily Terminated Anderson in Violation of Section 8(a)(3) and (1)

The General Counsel alleges that the Respondent violated Section 8(a)(3) and (1) on June 27, 2014, when, citing Anderson's record of tardiness, it terminated Anderson's employment. Under the Board's *Wright Line* decision, in cases alleging discrimination in violation of Section 8(a)(3) and (1), where motivation is at issue, the General Counsel bears the initial burden of showing that the Respondent's decision to take adverse action against an employee was motivated, at least in part, by antiunion considerations. 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983). The General Counsel may meet this burden by showing that: (1) the employee engaged in union or other protected activity, (2) the employer knew of such activities, and (3) the employer harbored animosity towards the Union or other protected activity. *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1184–1185 (2011); *ADB Utility Contractors*, 353 NLRB 166, 166–167 (2008), enf. denied on other grounds, 383 Fed. Appx. 594 (8th Cir. 2010); *Intermet Stevensville*, 350 NLRB 1270, 1274–1275 (2007); *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1105 (2000); *Regal Recycling, Inc.*, 329 NLRB 355, 356 (1999). Animus may be inferred from the record as a whole, including timing and disparate treatment. *Brink's, Inc.*, 360 NLRB No. 136, slip op. at 1 fn. 3 (2014); *Camaco Lorain Mfg. Plant*, supra; see also *Gaetano & Associates*, 344 NLRB 531, 532 (2005) (animus may be inferred from timing), enfd. 183 Fed. App. 17 (2d Cir. 2006), *Davey Roofing, Inc.*, 341 NLRB 222, 223 (2004) (same). If the General Counsel establishes discriminatory motive, the burden shifts to the employer to demonstrate that it would have taken the same action absent the protected conduct. *Camaco Lorrain*, supra; *ADB Utility*, supra; *Intermet Stevensville*, supra; *Senior Citizens*, supra.

The evidence supporting the General Counsel's prima facie case could hardly be stronger. Anderson was a known union activist—serving not only as a steward for the Union, but also sitting on its contract bargaining committee and its executive board. The Respondent, and in particular labor relations officials like Wesman, were well aware of these activities. In addition, on June 24—only one day before Wesman for the first time advocated that Anderson's decade long history of tardiness warranted termination—Wesman confronted, and unlawfully interrogated and threatened, Anderson about his union activity. Wesman was also part of the small cadre of Respondent officials that was involved in, inter alia, the unlawful interference with the union activities in the cafeteria on June 23 and 24. In addition to this evidence of animus very closely connected to Anderson's termination, the unlawful acts already found above demonstrate the Respondent's pervasively hostile attitude towards union activities relating to the informational picketing. The evidence shows that Anderson was engaged in

[45] It is settled that the test of interference, restraint and coercion under Sec. 8(a)(1) does not turn on the employer's motive or on whether the coercion succeeded or failed; the test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of Sec. 7 rights. *Medcare Associates, Inc.*, 330 NLRB 935, 940 fn. 17 (2000).

union activity, that the Respondent was aware of that activity and bore hostility towards it and, therefore, the General Counsel has met its initial burden of showing that the Respondent's decision to terminate Anderson was motivated, at least in part, by antiunion considerations.

Since the General Counsel has met its initial burden, the burden falls on the Respondent to show by a preponderance of the evidence that it would have terminated Anderson even in the absence of his protected activity. *Camaco Lorrain*, supra; *ADB Utility*, supra; *Intermet Stevensville*, supra; *Senior Citizens*, supra. The Respondent cannot meet this burden by simply showing a legitimate reason for the termination, but rather must show that it would have taken the same action for that legitimate reason even in the absence of the protected activity. *Monroe Mfg.*, 323 NLRB at 27; *T & J Trucking Co.*, 316 NLRB 771, 771 (1995), enfd. 86 F.3d 1146 (1st Cir. 1996) (Table). The record indicates that, on about June 27, Anderson's supervisor, Gubbins, would likely have imposed some type of discipline on Anderson even if she did not know about his protected activity. However, the record shows that the discipline imposed would, at most, have been a 2-day suspension if not for the fact that Wesman challenged the level of discipline that Gubbins planned and argued for Anderson's termination. On June 9, Anderson was late for work and Gubbins decided at that time that some level of discipline should be considered. She was considering either a written warning or a suspension. She sought the advice of both Sylvester and Wesman on that question. On June 10, Sylvester told Gubbins that what appeared to be appropriate under the tardiness guidelines was a written warning unless Anderson's prior suspension warranted "bumping" the discipline up to the suspension level. On June 11 and 12, Wesman, after obtaining background information about Anderson's tardiness issues, responded to Gubbins but did not make any recommendation about the appropriate level of discipline and, more tellingly, did not suggest that the range of discipline that Gubbins and Sylvester had been considering (verbal warning or suspension) was insufficiently harsh. Instead he asked Gubbins what she wanted to do.

Gubbins concluded that a 2-day suspension without pay was the appropriate level of discipline and she prepared a draft disciplinary notice for Anderson to that effect. Discipline of that kind had to be reviewed by the labor relations department and, on June 25, Gubbins forwarded the draft disciplinary notice imposing a suspension to Wesman and asked him "How does this look to you?" This was only 1 day after Wesman unlawfully confronted Anderson about his activity in support of the informational picketing. Within minutes of receiving Gubbins' draft suspending Anderson, Wesman responded as follows: "Judy [Gubbins], I do not agree. Termination is more than warranted and we will lose consistency when others are terminated for much less." Until that point—just one day after Wesman unlawfully interrogated and threatened Anderson—neither Wesman, nor anyone else involved in the discussions, had raised the possibility that Anderson would be terminated. The Respondent did not show that Gubbins had considered proposing termination during the discussions from June 9 to 24. After receiving Wesman's communication pressing for Anderson's termination, Gubbins altered the disciplinary notice to impose termination rather than suspension, although she left the notice otherwise unchanged. On June 27, Gubbins terminated Anderson and provided him with the disciplinary notice.

Based on the above, I find that Anderson would not have been terminated if not for the fact that Wesman challenged Gubbins' decision to impose lesser discipline and argued that Anderson had to be terminated. The question then narrows to whether the Respondent has shown by a preponderance of the evidence that Wesman would have taken that action in the absence of Anderson's protected activity. I conclude that the Respondent has not met its burden in that regard. Prior to unlawfully confronting Anderson about his protected activities on June 24, Wesman had not suggested that the range of discipline Gubbins was discussing with Sylvester—written warning or suspension – was inappropriate and had not argued for termination. The Respondent did not show that anything happened between June 11 (when Wesman expressed no disagreement with the warning-suspension discipline range) and June 25 (when Wesman objected to that discipline range and argued for termination) that would explain a change in outlook other than the fact that Anderson was involved in the informational picketing and had taken issue with Wesman's intimidation tactics on June 24. To the contrary, the evidence is that Anderson had no additional incidents of tardiness between June 11 and June 25.

In addition, although Anderson's tardiness problems stretched back a decade, and although Anderson had received discipline for those problems in the past, the Respondent did not show that Wesman had ever before argued that the level of discipline should be more severe. Indeed, although there was conclusory testimony that, for persons other than Anderson, Wesman had sometimes advocated for a stricter level of discipline than that which was proposed by a supervisor, the Respondent did not introduce evidence showing that Wesman's intervention in any such cases involved employees similarly situated to Anderson or that the intervention was comparably harsh.

Moreover, in the case of Anderson, Wesman could only justify termination by departing from the disciplinary chart in the tardiness guidelines. As Sylvester advised Gubbins, Anderson's record of 11 occurrences of over 5 minutes only warranted a written warning according to that chart. In order to terminate Anderson, it was necessary to depart from the very specific framework laid out in the disciplinary chart and invoke vague language providing that discipline could also be imposed based on a "discernible pattern of lateness less than 5 minutes." That language does not mention termination or specify what level of discipline will result from such a pattern or from specific numbers of latenesses of less than 5 minutes.

Both sides introduced evidence regarding the discipline imposed on other employees for tardiness. That evidence, which is set forth in some detail earlier in this decision, is inconclusive. In many instances it does not make clear whether the tardinesses were of more or less than 5 minutes (and thus does not show where they fall under the disciplinary chart in the tardiness guidelines), and in other instances it bases discipline on a period shorter than the rolling 12-month period that is set forth in the guidelines and was used in disciplining Anderson. Moreover, it appears to include examples both of employees

who received discipline short of termination even though their conduct was at least as severe as Anderson's under the tardiness guidelines and of employees who were terminated for conduct comparable to Anderson's.[46] It is also the case that Anderson's circumstances were somewhat unusual in that he was an employee of 11 years who was considered very capable in most respects, but had problems with tardiness for essentially the entire period of his employment, and who the Respondent had not previously sought to terminate. The comparator evidence was not complete enough to assess the extent to which Anderson's history differed from that of the comparators in those respects and, at any rate, the Respondent's witnesses did not clarify what weight was given to Anderson's longevity or positive attributes as an employee when the decision to terminate him was made.

To sum up, I find that although the evidence shows that in June 2014 the Respondent would likely have issued some discipline to Anderson absent his protected activities, the Respondent has failed to rebut the strong evidence indicating that he would not have been terminated if not for the Respondent's, and in particular Wesman's, hostility towards Anderson's union activity. As discussed above, Wesman had been involved with the discussions on the question of whether to warn or suspend Anderson earlier in June, but it was not until the day after he unlawfully confronted Anderson about his union activity that Wesman registered any objection to the warning/suspension level of discipline or advocated that Gubbins should, in a departure from the disciplinary chart in the tardiness policy, terminate Anderson.

For the reasons stated above, I conclude that the Respondent unlawfully discriminated against Anderson based on his union activities in violation of Section 8(a)(3) and (1) when it terminated him on June 27, 2014.

I. Allegation that the Respondent Violated Section 8(a)(1) and Section 8(a)(5) and (1) on August 21, 2014, when it Ejected Anderson from the Facility for Engaging in Union Activity in the Cafeteria and Threatened Arrest

The General Counsel argues that on August 21, 2014, the Respondent violated Section 8(a)(1) and Section 8(a)(5) and (1) of the Act when Wesman ejected Anderson from the facility because of his union activity in the cafeteria, and also threatened to have Anderson arrested if he conducted union business in the cafeteria again. At the time of these actions, Anderson's employment had already been terminated by the Respondent and he was present as a nonemployee SEIU organizer. The analysis and relevant case law is the same with respect to Anderson as it was for the other nonemployee SEIU representatives whose activities in the cafeteria the Respondent unlawfully interfered with on June 23 and 24. As in the earlier instances, Anthony was engaging with small groups of employees in the public cafeteria in a nondisruptive manner that was consistent with the way other visitors were using the cafeteria. Although the employee who Anderson had been speaking to, Combs, was not a bargaining unit employee, this was not known to either of them at the time and, at any rate, Combs testified that the conversation was not unpeaceful. Therefore, the Respondent violated Section 8(a)(1) when Wesman used ejection and threats of arrest to prevent Anderson from participating in orderly, nondisruptive, gatherings in a cafeteria that was open to the general public, while permitting comparable gatherings in the same location as long as union representatives and union subjects were not involved. See *Babcock & Wilcox*, supra, and *Baptist Medical*, supra.; see also *Fred Meyer Stores*, 359 NLRB 316, 317 (2012), reaffirmed by 362 NLRB No. 82 (2015) (employer violated Section 8(a)(1) when it prohibited union representatives from talking to employees on the store floor and threatened to have the union representatives arrested or removed from the store) and *Frontier Hotel & Casino*, 309 NLRB 761, 766 (1992) (Board affirms ALJ's finding that ejection of union representatives from the hotel's premises interfered with union-related communications and violated Section 8(a)(1)), enfd. in relevant part 71 F.3d 1434 (9th Cir. 1995).

The Respondent violated Section 8(a)(1) when on August 21, 2014, when it interfered with Anderson's union activities by ejecting him from the facility and threatening to have him arrested.

The General Counsel also alleges that the Respondent's interference with Anderson's activities August 21 constituted a unilateral change to an established practice regarding union access and therefore violated Section 8(a)(5) and (1). At the time that Wesman interrupted Anderson's activities he was talking to only one other individual—a type of activity that the Respondent, including labor relations officials Cahoon and Wesman, had known about and permitted prior to the events of late June. Moreover, Wesman's statement to Anderson on August 21 was not that union gatherings above a certain size were prohibited, but rather that there was a blanket prohibition on union business and activities in the cafeteria and that unions were not allowed in the cafeteria. The Respondent did not give the SEIU notice and an opportunity to bargain before implementing this prohibition, which was a change from the prior practice regarding SEIU access to, and use of, the cafeteria. A unilateral change that denies or reduces union access to unit employees, as this change did, is material in nature and a violation of Section 8(a)(5) and (1). *Turtle Bay Reports*, 355 NLRB at 1272–1273; *Frontier Hotel*, 323 NLRB at 817–818; *Ernst Home Centers*, 308 NLRB at 848-849; *American Commercial Lines*, 291 NLRB at 1072.

For the reasons discussed above, the Respondent made a unilateral change in violation of Section 8(a)(5) and (1) on August 21 when it prevented and prohibited Anderson from engaging

[46] These records show an instance in which an employee was not terminated even though, unlike Anderson, she had enough occurrences of over 5 minutes to trigger termination under the disciplinary chart. Specifically, on July 1, 2011, an employee who had 62 tardiness occurrences of 5 minutes or more during the relevant 12-month period was considered for termination but given only a warning. (R. Exh. 69.) The record shows that the employee was also late by less than 5 minutes on numerous occasions. This employee's tardiness record when the Respondent decided to issue the warning was at least as bad as Anderson's was when the Respondent terminated Anderson for 11 occurrences of 5 minutes or more, and his numerous latenesses of less than 5 minutes. On the other hand, the evidence showed that on July 16, 2014, another employee was terminated based on a record of 74 latenesses over approximately 14 months.

in union activity in the cafeteria that was open to the general public.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The SEIU and the MNA are labor organizations within the meaning of Section 2(5) of the Act.
3. The claims in this case are not appropriate for deferral to the parties' grievance and arbitration procedures.
4. The Respondent violated Section 8(a)(1) of the Act: on June 23 and June 24, 2014, when it prohibited nonemployee representatives of the SEIU and the MNA from having nondisruptive union-related conversations at the facility while in a cafeteria that was open to the general public; on June 24, 2014, when the Respondent physically interfered with the ability of nonemployee representatives of the SEIU and the MNA to meet with, and talk to, employees at the facility while in a cafeteria that was open to the general public; on June 24, 2014, by coercively surveilling the conversations that nonemployee representatives of the SEIU and the MNA had with employees; on June 23, 2014, when it ejected nonemployee union representatives Anthony and Scott from its facility and banned them from returning for a period of 1 year; on June 23, 2014, when it prohibited employee Anderson from posting union information on the bulletin board in the sterile processing department where he worked; on June 24, 2014, when the Respondent coercively interrogated employee Anderson about his union activities and threatened that such activities were being surveilled by the Respondent; on June 24, 2014, when it prohibited an off-duty bargaining unit employee and two nonemployee union representatives from wearing shirts with union insignias while in locations that were not immediate patient care areas; and on August 21, 2014, when it interfered with a nonemployee SEIU representative's union activities in a cafeteria that was open to the general public by ejecting him from the facility and threatening to have him arrested.
5. The Respondent violated Section 8(a)(5) and (1) of the Act: on June 23, June 24, and August 21, 2014, when it unilaterally imposed restrictions on the activities of nonemployee representatives of the MNA and the SEIU in the public cafeteria at the facility; and on June 23, 2014, when pursuant to the unlawfully imposed restriction it ejected nonemployee union representatives Anthony and Scott from the facility and banned them from returning for a period of 1 year.
6. The Respondent unlawfully discriminated against Melvin Anderson based on his union activities in violation of Section 8(a)(3) and (1) when it terminated him on June 27, 2014.
7. The Respondent was not shown to have committed the other unfair labor practices alleged in the complaint.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent, having discriminatorily discharged Anderson, must offer him full and immediate reinstatement and make him whole for any loss of earnings and other benefits. To the extent that a preponderance of the evidence of record, or adduced in a compliance proceeding, shows that absent its discriminatory animus the Respondent would, on or about June 27, 2014, have imposed the 2-day suspension proposed by Gubbins or other discipline affecting compensation, the backpay award will be reduced accordingly. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters and shall also compensate the discriminatee for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

In addition to other standard remedies, the General Counsel seeks imposition of an extraordinary remedy – that either Cahoon or Wesman be required to read the attached notice aloud to employees during working time. The Board has stated that such a requirement is not warranted except where the General Counsel shows that other remedies will be insufficient. *Chinese Daily News*, 346 NLRB 906, 909 (2006), enfd. 224 Fed.Appx. 6 (D.C. Cir. 2007). The evidence does not show that the employer has an extensive prior history of violations or of noncompliance with cease-and-desist orders. Since the evidence does not show that the traditional remedies will be insufficient in this case, I decline to recommend the extraordinary remedy sought by the General Counsel.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.[47]

ORDER

The Respondent, North Memorial Health Care, Robbinsdale, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting representatives of the SEIU and/or the MNA from engaging in nondisruptive activities with employees, or other union representatives, while at the Robbinsdale, Minnesota, facility (the facility) in areas that are open to the general public.

(b) Physically interfering with the ability of representatives of the SEIU and/or the MNA to meet with, and talk to, employees at the facility in areas that are open to general public.

(c) Coercively surveilling the activities that representatives of the SEIU and/or the MNA engage in at the facility.

(d) Ejecting nonemployee representatives of the SEIU and/or the MNA from the facility, banning such individuals from the facility, and/or threatening to have such individuals arrested because they engage in nondisruptive activities at the facility in areas that are open to the general public.

(e) Prohibiting employees in the sterile processing depart-

[47] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ment at the facility from posting information about union matters on the bulletin board in that department.

(f) Coercively interrogating employees about their union activities and/or threatening that the Respondent has placed such activities under surveillance.

(g) Prohibiting off-duty employees and/or nonemployee union representatives from wearing clothing with union insignias in locations at the facility that are not immediate patient care areas.

(h) Unilaterally changing the terms and conditions of employees represented by the SEIU and/or the MNA without notifying the representative and giving it an opportunity to bargain.

(i) Unilaterally imposing restrictions on the nondisruptive activities of nonemployee representatives of the SEIU and/or the MNA in areas at the facility that are open to the general public.

(j) Ejecting and/or banning nonemployee representatives of the SEIU and/or the MNA from the facility for violating unlawfully imposed restrictions on union activity.

(k) Discharging or otherwise discriminating against any employee for supporting the SEIU or any other union.

(l) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Immediately rescind the restrictions unlawfully imposed on the union activities of nonemployee union representatives.

(b) Immediately rescind the restrictions unlawfully imposed on employees' posting of union information on the bulletin board in the sterile processing department.

(c) Immediately rescind the restriction unlawfully placed on the wearing of clothing with union insignias in locations at the facility that are not immediate patient care areas.

(d) Immediately rescind the trespass notices/warnings issued to SEIU representative Frederick Anthony and MNA representative Karlton Scott, and notify them that this has been done.

(e) Within 14 days from the date of the Board's Order, offer Melvin Anderson full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(f) Make Melvin Anderson whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(g) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its facility in Robbinsdale, Minnesota, copies of the attached notice marked "Appendix."[48] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted, including all bulletin boards in break rooms located on units where bargaining unit employees work. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 23, 2014.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. September 3, 2015

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT prohibit representatives of SEIU Healthcare Minnesota (SEIU) and/or Minnesota Nurses Association (MNA) from engaging in nondisruptive activities with you or with one another at the Robbinsdale, Minnesota, facility (the facility) in areas that are open to the general public.

WE WILL NOT physically prevent representatives of the SEIU and/or the MNA from meeting with and talking to, you in areas at the facility that are open to general public.

WE WILL NOT watch or monitor the conversations that repre-

[48] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

sentatives of the SEIU and/or the MNA have with you, or one another, at the facility.

WE WILL NOT eject representatives of the SEIU and/or the MNA from the facility, ban such individuals from the facility, and/or threaten such with arrest because they engage in nondisruptive activities in areas at the facility that are open to the general public.

WE WILL NOT prohibit employees in the sterile processing department at the facility from posting information about union matters on the bulletin board in that department.

WE WILL NOT coercively interrogate you about union activities and/or threaten that we are watching or monitoring such activities.

WE WILL NOT prohibit off-duty employees and/or nonemployee union representatives from wearing clothing with union insignias in locations at the facility that are not immediate patient care areas.

WE WILL NOT unilaterally change the terms and conditions of employees represented by the SEIU and/or the MNA without notifying the representative and giving it an opportunity to bargain.

WE WILL NOT unilaterally impose restrictions on nondisruptive activities by representatives of the SEIU and/or the MNA in areas at the facility that are open to the general public.

WE WILL NOT eject and/or ban representatives of the SEIU and/or the MNA from the facility for violating unlawfully imposed restrictions on union activity.

WE WILL NOT discharge or otherwise discriminate against any employee for supporting the SEIU or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the restrictions unlawfully imposed on the activities of union representatives.

WE WILL rescind the restrictions unlawfully imposed on employees' posting of union information on the bulletin board in the sterile processing department.

WE WILL rescind the restriction unlawfully placed on the wearing of clothing with union insignias.

WE WILL rescind the trespass notices/warnings that we issued to SEIU representative Frederick Anthony and MNA representative Karlton Scott and notify them that this has been done.

WE WILL, within 14 days from the date of this Order, offer Melvin Anderson full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Melvin Anderson whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Melvin Anderson for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Melvin Anderson, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

NORTH MEMORIAL HEALTH CARE

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/18–CA–132107 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.